United States Circuit Court of Appeals

TENTH CIRCUIT

No. 1558

DAN B. SHIELDS, Individually and as United States Attorney for the District of Utah, and the INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED APRIL 26, 1937.

INDEX

	Original	Print
Bill of complaint for injunction and petition for declaratory judgment, filed June 24, 1936	2	1
Exhibit A—Paragraphs from Railway Labor Act	12	10
Order to show cause upon application for temporary injunction, filed June 24, 1936	14	13
Minute entry, June 27, 1936—Hearing on order to show cause continued	15	13
Return to rule to show cause, filed Aug. 18, 1936	15	14
Motion to dismiss bill of complaint, filed Aug. 27, 1936	16	15
Affidavit of service	17	16
Minute entry, Aug. 29, 1936—Hearing on rule to show cause and order on motion to dismiss	18	17
Amended bill of complaint, filed Sept. 8, 1936	18	17
Exhibit A—Article 112, Sec. 60, Revised Civil Statutes of Texas, 1911	30	28
Amendment to amended bill of complaint, filed Oct. 12, 1936	31	29
Answer of Dan B. Shields, filed Sept. 16, 1936	35	32
Minute entry, Sept. 16, 1936—Case set for trial Oct. 5, 1936	40	37
Minute entry, Sept. 26, 1936—Case set for trial Oct. 12, 1936	40	37

	Original	Print
Petition of Interstate Commerce Commission for leave to intervene as a party defendant, filed Oct. 5, 1936	40	37
Order granting Interstate Commerce Commission for leave to intervene, filed Oct. 5, 1936	42	39
Answer of Interstate Commerce Commission, filed Oct. 5, 1936	42	39
Exhibit A—Report of Interstate Commerce Commission in a proceeding entitled "Railway Labor Act, Docket No. 12, Utah Idaho Central Railroad Co."	46	42
Reply to answer of defendant, filed Oct. 12, 1936	47	53
Answer and reply to answer of Interstate Commerce Commission, intervening defendant, filed Oct. 12, 1936	48	54
Stipulation for transfer of case from Central Division to Northern Division, filed Oct. 12, 1936	50	56
Minute entries, Oct. 12, 13, 14, 15, 1936—Trial proceedings	50	57
Findings of fact and conclusions of law, filed Oct. 15, 1936	52	58
Decree, filed Oct. 15, 1936	65	68
Orders extending time for bill of exceptions:		
November 23, 1936	66	69
December 21, 1936	66	70
January 29, 1937	73	75
February 13, 1937	73	76
Petition for appeal, filed Jan. 12, 1937	67	70
Order allowing appeal, filed Jan. 12, 1937	68	71
Assignment of errors, filed Jan. 12, 1937	68	72
Citation with affidavit of service	71	74
Order enlarging time within which to docket appeal, filed Feb. 17, 1937	177	152
Order enlarging time within which to docket appeal, filed March 24, 1937	72½	75
Statement of the evidence, filed Feb. 17, 1937	74	76
Plaintiff's evidence:		
P. A. Mulcahy	76	77
C. D. Cass	162	142
Nelson Thomas	164	143
Statement by the court re findings and conclusions	168	147
Approval of statement of the evidence	174	151
Stipulation re certain exhibits, filed Feb. 16, 1937	175	151
Stipulation waiving bond on appeal, filed Feb. 16, 1937	175	152
Praecipe, filed Feb. 17, 1937	178	153
Clerk's certificate	181	156
Plaintiff's Exhibits.		
1—General map of Utah Idaho Central Railroad	180	157
2—Franchises of Utah Central Railroad (abstracted)	181	158
3—Historical sketch of Utah Idaho Central Railroad and its predecessors	317	158

	Original	Print
4—Description of purpose and method of operations of Utah Idaho Central Railroad	320	161
5—Description of motive power of Utah Idaho Central Railroad	323	164
6—List of equipment owned by Utah Idaho Central Railroad showing whether interchanged with steam railroads	333	165
7—Statement of substation power	335	166
8—Statement of carrying capacity	335	166
9—Statement showing character of track construction	338	168
10—List of spurs, sidings and passing tracks showing capacity in cars (abstracted)	339	169
11—Statement showing miles of main line track located in streets and highways	344	170
12—Plats of various stations on Utah Idaho Central Railroad showing restrictive curvature of turn-outs sidings and spurs	345½	171
13—Statement showing pronounced main line grades	346	196
14—Graphs showing condensed profile and locomotive tonnage curve	348½	200
15—Statement of number of trains operated during years 1932 to 1935, inc., and average number operated daily	349	209
16—List of passenger stations on Utah Idaho Central Railroad showing mileage from Ogden, mileage between stations and population of towns	352	211
17—Statement of number of passengers and amount of passenger revenue, etc., for year 1931 to 1935, inc.	355	213
18—Statement of number of passengers as between regular passengers and students for the years 1931 to 1935, inc.	356	214
19—Statement showing capacity of sidings and various steam railroads operating out of Utah (abstracted)	357	215
20—Selected operating statistics of steam railroads connecting with Utah Idaho Central Railroad, etc.	362	216
21—Comparison of selected operating statistics on Chicago, Milwaukee, St. Paul & Pacific Railroad designed to show relative labor cost as between steam operation and electric operation	369	222
22—Graph showing average freight cars per train	371A	224
23—Graph showing average passenger cars per train	371B	225
24—Graph showing cost of Enginemen, etc., per car mile freight	371C	226
25—Graph showing cost of enginemen, etc., per car mile passenger	371D	227
26—Letter, June 29, 1918, to M. S. Browning, President, Utah Idaho Central Railroad and statement of revenues, 1916 to 1934, inc.	372	228
27—History of labor agreements between company and various crafts of employees	373	230
27-1—Agreement between Railroad Company and Station Employees Association (abstracted)	374	231
27-2—Agreement between Railroad Company and employees of the electric and mechanical department (abstracted)	386	231
27-3—Agreement between Railroad Company and the Amalgamated Association of Street and Electric Railway Employees and Coach Operators of America (abstracted)	393	231

	Original	Print
Plaintiff's Exhibits—Concl.		
28—Condensed income statement of Utah Idaho Central Railroad Co. for years 1930 to 1935, inc.	420	232
32—Certificate of incorporation of Utah Idaho Central Railroad (abstracted)	422	235
33—Letter, Dec. 1, 1933, Brotherhood of Railroad Trainmen and Order of Railroad Telegraphers to P. H. Mulcahy, General Manager, Utah Idaho Central Railroad	433	235
34—Letter, Dec. 12, 1953, to H. C. Tanner, Brotherhood of Railroad Trainmen	434	236
35—Letter, Dec. 15, 1933, to H. C. Tanner to P. H. Mulcahy, General Manager	435	237
36—Letter, Dec. 15, 1933, to H. C. Tanner, Deputy President	437	238
37—Letter, Jan. 8, 1934, Brotherhood of Railroad Trainmen to P. H. Mulcahy, General Manager	437	238
38—Letter, Jan. 17, 1934, to Brotherhood of Railroad Trainmen	439	239
39—Letter, April 13, 1934, to Brotherhood of Railroad Trainmen to P. H. Mulcahy, General Manager	440	240
40—Proposed agreement between Utah Idaho Central Railroad and Brotherhood of Railroad Trainmen (abstracted)	442	241
41—Letter, July 8, 1936, D. A. MacKenzie, Vice-President Railroad Trainmen, to P. H. Mulcahy, General Manager	456	241
42—Advertisements of Utah Idaho Central Railroad	457	242
Time tables	459	243
43 to 43-K, inc.—Statements of Interstate Commerce Commission concerning electric railways:		
From 35th Annual Report	464	246
From 36th Annual Report	465	247
From 37th Annual Report	468	248
From 38th Annual Report	468	248
From 39th Annual Report	468	249
From 40th Annual Report	470	249
From 41st Annual Report	470	250
From 42nd Annual Report	471	250
From 43rd Annual Report	475	252
From 44th Annual Report	477	253
From 45th Annual Report	482	256
From 46th Annual Report	482	256
From 47th Annual Report	483	257
From 48th Annual Report	485	258
From 49th Annual Report	486	258
44 and 45—Selected financial and operating data from annual reports of electrical railways for year ended Dec. 31st, 1934 (abstracted)	490	260
46—Statement of parts of Bureau of Census reports with regard to development of interurban electric railways	599	261
47—From special reports of Bureau of Census, street and electric railways, 1907	601	263
48—From report of Bureau of Census, 1912	604	265
49—Transcript of proceedings before Interstate Commerce Commission	605	266
Defendant's Exhibit.		
A—Opinion of Interstate Commerce Commission in Railway Labor Act Docket No. 12	670	314

	Original	Print
eedings in U. S. C. A., Tenth Circuit		327
r of submission		327
e		327
on, Lewis, J		327
rring opinion, Williams, J		334
nting opinion, Bratton, J		335
's certificate		343
allowing certiorari		344

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH—CENTRAL DIVISION

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE TILLMAN D. JOHNSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, a Corporation, COMPLAINANT,

vs.

DAN B. SHIELDS, Individually and as United States Attorney for the District of Utah, DEFENDANT, and INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT.

No. 12924, Equity.

Bill of Complaint for Injunction and Petition for Declaratory Judgment

Your petitioner, The Utah Idaho Central Railroad Company, suing herein also for its officers and agents, complaining of and against Dan B. Shields, individually and as United States Attorney for the District of Utah, respectfully represents:

1. That plaintiff The Utah Idaho Central Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, of which it is a citizen, qualified under the laws of the States of Utah and Idaho to do business in said States, with its principal office and place of business located in Ogden City, Weber County, State of Utah; that the defendant Dan B. Shields resides in Salt Lake City, Salt Lake County, State of Utah, in the District of Utah, Central Division, and is the United States Attorney duly appointed, qualified and acting in and for said District of Utah, and he is sued herein individually and as such United States Attorney.

2. That this is a suit in equity of a civil nature, arising under the laws of the United States, and presents and in-

volves an actual controversy between the plaintiff and the defendant, and the matter in controversy as to the plaintiff, exclusive of interest and costs, exceeds the sum of $3,000.00, as will be hereinafter more particularly alleged, and relates to an Act of Congress regulating Interstate Commerce, to wit: "An Act to amend the Railway Labor Act, approved June 21, 1934, entitled: 'An Act to amend the Railway Labor Act, approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employes'", hereinafter called the Railway Labor Act.

3. That plaintiff brings this suit to prevent irreparable injury and damage to it and its business and property used in the transportation of persons and property and to prevent and restrain the defendant individually and in his official capacity from the threatened enforcement of fines and penalties against the plaintiff and its officers and agents, for alleged violation of any of the provisions of the Railway Labor Act, and for any alleged failure or refusal on their part respectively to conform to the provisions of said Act.

4. That the Utah Idaho Central Railroad Company is
3 engaged in the business of operating as a common carrier an electric interurban line of railroad between Ogden City in the County of Weber, State of Utah, and Preston, in the County of Franklin, State of Idaho, for the transportation of passengers, freight, express and baggage between said terminal points and intermediate points, and is engaged also in the operation as a common carrier of a bus line upon the State and County highways between said terminal points and all intermediate points, substantially *parallelling* said line of interurban electric railroad, for the transportation of passengers, baggage and express.

5. That prior to the year 1914, there was operated in the City of Ogden, in Weber County, State of Utah, a street car system of horse drawn cars, and also an interurban line running from the North City limits of Ogden City to Hot Springs, Utah, a distance of approximately ten miles. That these properties prior to the year 1914 were acquired by Ogden Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, and electrified as an electric interurban railroad and extended to Brigham City, Box Elder County, State of Utah; that prior to said year 1914, there was operated in the City of Logan a street car

system which prior to said year had been electrified and extended as an interurban railroad northward to Smithfield, Utah, and southward to Wellsville, Utah, which said interurban electric railroad was owned and operated by Logan Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah; that these city and interurban railroads had been constructed by and were being operated by a group of citizens of northern Utah, interested in the Agricultural, industrial and social development of northern Utah and that portion of the State of Idaho which constitutes a part of Cache Valley, which is for the most part located in Utah, and who were desirous of furnishing to that territory as a whole a transportation system which would better serve its needs than the steam
4 railroad operating therein, namely, the Oregon Short Line Railroad, and to that end determined to consolidate the two electric interurban properties above referred to, and accordingly in the year 1914 the said Ogden Rapid Transit Company and said Logan Rapid Transit Company were under the laws of the State of Utah consolidated into a corporation known as Ogden Logan & Idaho Railway Company, which continued to own, control and operate the properties formerly owned and operated by its constituent companies and in precisely the same and identical manner in which it had been operated by its constituent companies, and rebuild that portion of the line running northward from Ogden City to Brigham City, and constructed a new electric line from Brigham City north over the Collinston divide, thus connecting the interurban lines formerly operated by its constituent companies, and also constructed a new line from the northern terminus of the line of said Logan Rapid Transit Company to Preston, Idaho, the principal city in the Northern part of Cache Valley, a distance of six miles north of the Utah line; that thereafter said Ogden Logan & Idaho Railway Company, which by an amendment of its articles of incorporation changed its corporate name to Utah Idaho Central Railroad Company, continued to own, control and operate the electric street car system in the City of Ogden, the electric street car system in the City of Logan, and the interurban electric line, which had been developed out of the electric interurban properties of its constituent companies, in precisely the same manner they had been operated from the time of their construction, until the year 1920, when the city street car system in Ogden City was segregated

from the interurban operations of the company and transferred to the Utah Rapid Transit Company; that the operation of the interurban line from Ogden, Utah, to Preston, Idaho, and the operation of the street car system in Logan City remained with the Utah Idaho Central Railroad Company until the year 1926, when that company went through a receivership in this court, which resulted in the properties being acquired by the plaintiff The Utah Idaho Central Railroad Company, and the same have since been owned, controlled and operated by said company in precisely the same manner they had been operated theretofore since their construction, except that the plaintiff company has instituted a bus operation in lieu of the street car lines in Logan City and has instituted a bus system over the State and County highways substantially parallelling its rail line from Ogden, Utah, to Preston, Idaho, for the transportation of passengers, baggage and express.

6. That the resources of the territory served by plaintiff north of Ogden to the Collinston divide, being the northern part of the Salt Lake Valley, and the resources of the Cache Valley hereinbefore referred to are wholly agricultural in character and the only industrial development of which the territory has been or will be capable is the construction and operation of processing plants to enable the agricultural products of the territory to reach the outside market, such as beet sugar factories, vegetable packing plants, milk condensing plants, etc.; that from the time of the construction of the interurban line of railroad heretofore refered to and now owned, controlled and operated by the plaintiff, this industrial development has been fostered by it by collecting the raw products from the fields and delivering them to the processing plants located on its line, and delivering to those plants the materials necessary for such processing from outside the territory served by the plaintiff, such as coal, lime, etc., by transporting by means of its interurban line the processed products from the processing plants and delivering them to the steam railroads for transportation to the outside market; that by means of its interchange with steam railroads, wholly as an initiating or reciving carrier, without discrimination as to preference as to which steam railroad is used, plaintiff has also fostered the agricultural development of the territory by delivering to the farms such needed merchandise from the outside, and delivering from said farms to the outside market such agricultural products as could be marketed without being pro-

ceased; plaintiff has likewise fostered the social development of the territory by the transportation to and from the farms to the larger communities of the people inhabiting the territory, and especially in the transportation of the school children, thus enabling such schools to be restricted to the larger communities so as to be fully equipped to serve their purposes and yet serving all of the children of the territory equally.

7. To meet these needs of the people of the territory,
6 agricultural, industrial and social, that type of transportation operation which is peculiarly the electric interurban type was and is necessary, namely, short speedy trains operated at frequent intervals, making frequent stops, in many instances where no agents are maintained, for the transportation of both passengers and freight, practically to and from the individual farms, and to and from the processing plants and community centers, and to and from the outside world, to enable the products of the soil to reach their markets either as raw or as processed products, and the products from the outside to reach the farms and processing plants and enable the people of the territory to keep in touch with the outside world.

8. That in harmony with said purposes as above outlined, the interurban line of the plaintiff was constructed and has ever since been maintained and operated, and its physical characteristics are such as to limit its operations to that of an interurban railway; that all of its physical elements, motive power, equipment, track construction, length of spur and sidings, curvature and grade are co-ordinated into an integral whole, which necessitates an operation which is peculiar to interurban electric railroads and that continuously since its construction it has been so operated and that without a complete change of all of its physical elements it could not operate except as an interurban electric railroad and could not be operated as ordinary commercial steam railroads are commonly operated.

9. That Section 1 of the Railway Labor Act defines the term "carrier" as follows:

"Section 1. When used in this Act and for the purposes of this Act:—

"First. The term 'carrier' includes any express com-
7 pany, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which

is directly or indirectly owner or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any carrier, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'; Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

10. That plaintiff is an electric interurban railway, as said term is used in and within the purview of said Railway Labor Act; that it is not operated as part of a general steam railroad system of transportation; that none of its stock or securities are owned by any general steam railroad system of transportation, or by any steam railroad company, and no general steam railroad system of transportation, and no steam railroad company, nor any of its officers and agents, have any control of or voice whatever in its management or operation, and plaintiff is exempt from any and all provisions of the said Railway Labor Act.

11. That under the Interstate Commerce Act, Railway Mail Pay Act and other Acts of Congress administered by the Interstate Commerce Commission, the Commission has given the plaintiff and other electric railways a different designation and classification from that given common carriers by railroad subject to the Railway Labor Act, and the Commission as well as various courts and other administrative agencies, State and Federal, have designated plaintiff and similar electric railways as interurban electric railways.

12. That in said Railway Labor Act certain terms are defined, as such terms are therein used, and certain omissions

and acts of commission on the part of the carrier subject thereto, its agents and officers, are made penal offenses, involving heavy fines or imprisonment, or both; that exact copies of the sixth paragraph of Section 1, the third, fourth,
8 fifth, seventh, eighth and tenth paragraphs of Section 2, and Section 6 thereof are hereto attached, marked Exhibit A, hereby referred to and by this reference made a part hereof.

By Section 4, First, of the Railway Labor Act, there is created a board known as the National Mediation Board, which is given certain powers and duties in connection with the administration of said Act. Among such duties and powers is the duty to prescribe the form of notice to carrier employes, as set out in Section 2, Eighth, thereof; that the Mediation Board has heretofore prescribed the form of notice provided for in the eighth paragraph of Section 2 of the Act and ordered that it be posted as therein specified, thereby demanding that all employes be thereby notified that all disputes between the carrier and them will be handled in accordance with the provisions of said Act; that plaintiff has not complied with said order; that if plaintiff continues to fail to comply with said order and otherwise fails to comply with the provisions of said Act, it will subject itself to prosecutions for the penalties hereinbefore set out, notwithstanding that as an interurban electric railroad it is not subject to the provisions thereof; that if it does comply with said order and with the other provisions of said Act, it thereby admits that it is subject to the provisions thereof and thereby voluntarily submits itself to the provisions thereof, notwithstanding it is not subject thereto, and such compliance on the part of the plaintiff, notwithstanding it is not subject thereto, will subject it to immediate and irreparable injury and damage, in that such compliance will unlawfully deprive plaintiff of the liberty of contract and it will be compelled to negotiate with its trainmen and other employes, through a representative or representatives of their own choosing, regardless of who such representative or representatives may be, and regardless of whether such representative or representatives are or are not employes of the plaintiff, and in that such compliance will result in demands for increase of wages on the part of employes, and demands for rules and working conditions with respect
9 thereto that the plaintiff is unable to grant, because its financial condition will not permit it so to do without

immediately impairing and ultimately destroying its ability to continue to operate and to serve the public in the manner in which it has served it in the past, and this notwithstanding plaintiff has never had any disputes with its employes which have not been amicably adjusted, and notwithstanding it has continuously operated under contracts with organizations of its employes which are absolutely independent of it and in no wise under its control, as to rates of pay, rules and working conditions, because plaintiff's employes will be influenced to abandon their present organizations and to join those organizations of employes on transcontinental steam railroads throughout the country, on the promise that they will receive the higher or so-called steam railroad standard wages and the different or so-called standard rules and working conditions prevailing thereon, which said organizations represent the employes of said transcontinental steam railroads, and will then demand such higher wages and such different rules and working conditions which prevail on said transcontinental steam railroads, which said wages and rules and working conditions are unwarranted and inapplicable to plaintiff, and if plaintiff refused to pay such wages and to adopt such rules and working conditions labor disputes and strikes will result, which will inflict such financial losses upon the plaintiff that it will be unable to continue to operate and to serve the public in the manner in which it has been doing in the past, and in that under Section 3 of the Act disputes with reference to interpretation of agreements between plaintiff and its employes, and as to grievances of plaintiff's employes against it, and as to the discharge of any of its employes, will have to be submitted to the National Railroad Adjustment Boards which have been created under said Act without the plaintiff having any part in the selection of the members thereof.

13. That the defendant Dan B. Shields, United States Attorney for the District of Utah, is charged by law with the enforcement of said Act and with the duty of filing suits and prosecuting plaintiff and its officers and agents under the direction of the Attorney General, for violations of said paragraph of said Section of the Act; that the defendant has threatened to file suits and prosecute the plaintiff and its officers and agents for the failure upon the part of the plaintiff to comply with the Railway Labor Act, and that unless the relief herein prayed for is granted he will do so; that under

the circumstances herein alleged plaintiff is without adequate remedy at law and that it is entitled as of right to immunity from the severe and cumulative penalties pending an orderly and judicial test of the application of said Act to plaintiff, and those particular portions thereof aforesaid, and the question of whether or not it is subject to the provisions of said Act; and in order that such test may be initiated and determined judicially, it should be protected against any prosecution or prosecutions for violation of said penal provisions of said Act, or any of them, pending such judicial determination.

Wherefore plaintiff prays:

1. That this court take jurisdiction of this case and cause appropriate process to issue against the defendant Dan B. Shields, United States Attorney for the District of Utah, and require him to answer this bill of complaint, as required by the rules of this court and as required by law.

2. That pending final hearing herein, the court cause to be issued and served upon the defendant an order to show cause why a temporary injunction should not issue against said defendant and upon the hearing thereof that the court issue a temporary injunction in accordance with the rules of this court enjoining and restraining the defendant from initiating, from prosecuting, and from initiating and prosecuting any suit or suits against the plaintiff, its officers and agents, or any of them, based upon the alleged violation by them, or any of them, of any of the provisions of the Railway Labor Act, or based upon the alleged violation of Section 2 thereof, or either of them;
that that upon final hearing said injunction be made
11 final and perpetual; that upon final hearing of this cause,
the court shall order, adjudge and decree, pursuant to the provisions of the Federal Declaratory Judgment Act as amended, that the plaintiff is an electric interurban railroad not operating as a part of a general steam railrod system of transportation, and as such is not subject to the provisions of the Railway Labor Act.

3. That plaintiff shall have such other, further and general or special relief as the nature of the case may require and the court may deem just and proper in the premises.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

By P. H. Mulcahy, Its General Manager, Plaintiff.

J. H. DeVine, J. A. Howell, David L. Stine, Attorneys and Solicitors for Plaintiff, 625 Eccles Building, Ogden, Utah.
(Duly verified)

Filed in United States District Court, District of Utah June 24, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

Exhibit A

Section 1.

12

* * *

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * *

Section 2.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor repre-

sentative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, that nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carriers shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * *

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties regardless of any other express or implied agreements between them.

13

* * *

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the 3rd, 4th, 5th,

7th or 8th paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than 6 months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act, shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal Act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

* * *

Section 6. Carriers and representatives of the employees shall give at least 30 days' written notice of an intended change in agreement affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within the 30 days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conference without request for or proffer of the services of the Mediation Board.

Order to Show Cause Upon Application for Temporary Injunction and Setting Same for Hearing

14 Whereas, in the above entitled cause, a verified bill of complaint for injunction and petition for declaratory judgment has been filed; and

Whereas, it appears from said bill of complaint and petition that there is danger of immediate and irreparable injury, loss or damage being caused to the plaintiff; and

Whereas, said bill of complaint prays that a temporary injunction be granted to the plaintiff against the defendant, after notice and hearing, enjoining the defendant until the final hearing of said cause or until the further order of this court from initiating and prosecuting any suit or suits against the plaintiff, its officers or agents, or any of them, based upon the alleged violation by them, or any of them, of any provisions of an Act of Congress regulating Interstate Commerce, entitled "An Act to amend the Railway Labor Act, approved June 21, 1934, entitled: 'An Act to amend the Railway Labor Act, approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employes'", commonly known as the Railway Labor Act, or based upon the alleged violation of Section 2 thereof, or either of them:

Now, therefore, it is ordered that this cause be set down for hearing upon the application for a temporary injunction, as hereinbefore set forth, at the court room of this court, at the Federal Building, in Salt Lake City, Salt Lake County, State of Utah, on the 27th day of June, 1936, at the hour of 10:00 A. M. and the defendant is hereby notified of said hearing.

Dated: June 24, 1936.

By the Court,

TILLMAN D. JOHNSON, Judge.

Filed in the United States District Court, District of Utah June 24, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Minute Entry—June 27, 1936.

15 At this 27th day of June, 1936, plaintiff appearing by J. A. Howell, its solicitor, and defendant by Scott M.

Matheron, his attorney, and hearing on order to show cause heretofore filed was continued to August 29, 1936, with the understanding that the Government take no action to collect taxes or assess penalties until order to show cause has been disposed of.

Return To Rule To Show Cause

The Defendant for a return to the rule to show cause herein states that he is the United States Attorney for the District of Utah, that he has made no threats to prosecute any proceedings against the plaintiff, and that the Attorney General of the United States has not requested him to prosecute the plaintiff for alleged violations of the Railway Labor Act.

Defendant states that the Bill of Complaint fails to state a cause of action against him entitling plaintiff to a temporary injunction for the following reasons:

(1) The court is without jurisdiction to entertain plaintiff's Bill of Complaint as an original action to determine the status of the plaintiff's line because the Congress, within its competency, has conferred such jurisdiction upon the Interstate Commerce Commission;

(2) The Bill of Complaint contains no allegation that the plaintiff has exhausted its administrative remedy under the Railway Labor Act by having its status determined by the Interstate Commerce Commision;

(3) The plaintiff's suit is premature in that the Bill of Complaint does not contain an allegation that the Attorney General of the United States had directed the defendant to prosecute any proceedings against the plaintiff;

(4) The court has jurisdiction only to review a record made before the Interstate Commerce Commission, wherein the status of an electrically operated interstate carrier is determined by said Commission, in order to ascertain whether or not a determination by the Commission is based upon evidence, is arbitrary, capricious or unreasonable;

(5) The Bill of Complaint does not state facts entit-
16 ling the plaintiff to the relief demanded.

Having fully shown cause why a temporary injunction

should not be granted herein the Defendant prays that the application of plaintiff therefor should be denied.

DAN B. SHIELDS,
Individually and as United States Attorney for the District of Utah.

LEO F. TIERNEY,
Special Assistant to the Attorney General.

JOHN DICKINSON,
Assistant Attorney General.

(Duly verified)

Filed in United States District Court, District of Utah Aug. 18, 1936 W. B. Wilson, Clerk By M. S. Sturdevant, Deputy.

Motion To Dismiss Bill of Complaint

Comes now the Defendant and respectfully moves the Court to dismiss the Bill of Complaint herein against him for the following reasons:

(1) The court is without jurisdiction to entertain plaintiff's Bill of Complaint as an original action to determine the status of the plaintiff's line because the Congress, within its competency, has conferred such jurisdiction upon the Interstate Commerce Commission;

(2) The Bill of Complaint contains no allegation that the plaintiff has exhausted its administrative remedy under the Railway Labor Act by having its status determined by the Interstate Commerce Commission;

(3) The plaitiff's suit is premature in that the Bill of Complaint does not contain an allegation that the Attorney Genral of the United States had directed the defendant to prosecute any procedings against the plaintiff;

17

(4) The Court has jurisdiction only to review a record made before the Interstate Commerce Commission, wherein the status of an electrically operated interstate carrier is determined by said Commission, in order to ascertain whether or not a determination by the Commission is based upon evidence, is arbitrary, capricious or unreasonable;

(5) The Bill of Complaint does not state facts entitling the plaintiff to the relief demanded.

LEO F. TIERNEY,
Special Assistant to the Attorney General.

JOHN DICKINSON,
Assistant Attorney General.

Filed in the United States District Court, District of Utah August 27, 1936 W. B. Wilson, Clerk By M. S. Sturdevant, Deputy.

Affidavit of Service

The United States of America, District of Utah, Central Division. ss.

Winnie Esterak, being first duly sworn upon her oath, deposes and says:

That she is a Clerk in the Office of the United States Attorney for the District of Utah; that on August 18, 1936, she served Return To Rule To Show Cause and Motion to Dismiss Bill of Complaint in the above entitled cause on The Utah Idaho Central Railroad Company, a corporation, by placing a true copy of said Return To Rule To Show Cause and Motion to Dismiss Bill of Complaint in a franked envelope of the United States addressed to Counsel for said The Utah Idaho Central Railroad Company as follows:

DeVine, Howell & Stine,
18 625 Eccles Building,
Ogden, Utah;

and deposited the said envelope in the United States Post Office at Salt Lake City, Utah, for mailing and delivery to said Counsel for Plaintiff in the above entitled cause.

(Seal) WINNIE ESTERAK.

Subscribed and sworn to before me this 18th day of August, A. D. 1936 W. B. Wilson, Clerk U. S. District Court for the District of Utah, By M. S. Sturdevant, Deputy.

Filed in United States District Court, District of Utah Aug. 18, 1936 W. B. Wilson, Clerk, By M. S. Sturdevant, Deputy

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Minute Entry—August 29, 1936

At this 29th day of August, 1936, plaintiff appearing by J. A. Howell and D. L. Stine, its solicitors, and defendant by Scott M. Matheson, Assistant United States Attorney, and Leo F. Tierney, Special Assistant to the Attorney General of the United States, his solicitors, and this cause came on for hearing on Rule to show cause and motion to dismiss heretofore filed and it is ordered by the Court that the plaintiff have ten days in which to amend its bill; that defendant be given ten days thereafter in which to renew its motion to dismiss its bill of complaint or otherwise further plead; that the plaintiff's application for temporary injunction be continued to next rule day.

Amended Bill of Complaint for Injunction and Petition for Declaratory Judgment

To the Honorable Tillman D. Johnson, Judge of said Court:

Your petitioner, The Utah Idaho Central Railroad Company, by leave of court first had and obtained, makes and files this amended bill of complaint for injunction and petition for declaratory judgment, and suing herein also for its officers and agents, complaining of and against Dan B. Shields, individually and as United States attorney for the District of Utah, defendant, respectfully represents:

1. That plaintiff The Utah Idaho Central Railroad
19 Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, of which it is a citizen, qualified under the laws of the State of Utah and Idaho to do business in said States, with its principal office and place of business located in Ogden City, Weber County, State of Utah; that the defendant Dan B. Shields resides in Salt Lake City, Salt Lake County, State of Utah, in the District of Utah, Central Division and is the United States Attorney duly appointed, qualified and acting in and for said District of Utah, and he is sued herein individually and as such United States Attorney.

2. That this is a suit in equity of a civil nature, arising under the laws of the United States, and presents and involves an actual controversy between the plaintiff and the defendant, and the matter in controversy as to the plaintiff, exclusive of

interest and costs, exceeds the sum of $3,000.00, as will be hereinafter more particularly alleged, and relates to an Act of Congress regulating Interstate Commerce, to-wit, "An Act to amend the Railway Labor Act, approved June 21, 1934, entitled: 'An Act to amend the Railway Labor Act, approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employes'", hereinafter called the Railway Labor Act.

3. That plaintiff brings this suit to prevent irreparable injury and damage to it and its business and property used in the transportation of persons and property and to prevent and restrain the defendant individually and in his official capacity from the threatened enforcement of fines and penalties against the plaintiff and its officers and agents for alleged violation of any of the provisions of the Railway Labor Act and for any alleged failure or refusal on their part respectively to conform to the provisions of said Act.

4. That The Utah Idaho Central Railroad Company is engaged in the business of operating as a common carrier an electric interurban line of railroad between Ogden City in the County of Weber, State of Utah, and Preston, in the County of Franklin, State of Idaho, for the transportation of passengers, freight, express and baggage between said terminal points and intermediate points, and is engaged also in the operation as a common carrier of a bus line upon the State and County highways between said terminal points and all intermediate points substantially parallelling said line of interurban electric railroad for the transportation of passengers, baggage and express.

5. That prior to the year 1914, there was operated in the City of Ogden, in Weber County, State of Utah a street car system and also an interurban line running from the north city limits of Ogden City to Hot Springs, Utah, a distance of approximately ten miles. That these properties prior to the year 1914 were acquired by Ogden Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, and electrified as an electric interurban railroad and extended to Brigham City, Box Elder County, State of Utah; that prior to said year 1914, there was operated in the City of Logan a street car system which prior to said year had been electrified and extended as an interurban

railroad northward to Smithfield, Utah, and southward to Wellsville, Utah, which said interurban railroad was owned and operated by Logan Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah; that these city and interurban railroads had been constructed by and were being operated by a group of citizens of northern Utah, interested in the agricultural, industrial and social development of northern Utah and that portion of the State of Idaho which constitutes a part of Cache Valley, which is for the most part located in Utah, and who were desirous of furnishing to that territory as a whole a transportation system which would better serve its needs than the steam railroad operating therein, namely, the Orgeon Short Line Railroad, and to that end determined to consolidate the two electric interurban properties above referred to, and accordingly in the year 1914 the said Ogden Rapid Transit Company were under
21 the laws of Utah consolidated into a corporation known as Ogden, Logan & Idaho Railway Company, which continued to own, control and operate the properties formerly owned and operated by its constituent companies and in precisely the same and identical manner in which it had been operated by its constituent companies, and rebuilt that portion of the line running northward from Ogden City to Brigham City, and constructed a new electric line from Brigham City north over the Collinston divide, thus connecting the interurban lines formerly operated by its constituent companies, and also constructed a new line from the northern terminus of the line of said Logan Rapid Transit Company to Preston, Idaho, the principal city in the northern part of Cache Valley, a distance of six miles north of the Utah Line; that thereafter said Ogden Logan & Idaho Railway Company, which by an amendment of its articles of incorporation changed its corporate name to Utah Idaho Central Railroad Company, continued to own, control and operate the electric street car system in the city of Ogden, the electric street car system in the City of Logan, and the interurban electric line, which had been developed out of the electric interurban properties of its constituent companies, in precisely the same manner they had been operated from the time of their construction, until the year 1920, when the city street car system in Ogden City was segregated from the interurban operations of the company and transferred to the Utah Rapid Transit Company; that the operation of the interurban line from Ogden, Utah, to Preston,

Idaho, and the operation of the street car system in Logan City remained with the Utah Idaho Central Railroad Company until the year 1926, when that company went through a receivership in this court, which resulted in the properties being acquired by the plaintiff The Utah Idaho Central Railroad Company, and the same have since been owned, controlled and operated by said company in precisely the same manner they had been operated theretofore since their construction, except that the plaintiff company has instituted a bus operation in lieu of the street car lines in Logan City and has instituted a bus system over the State and County highways substantially paral-
22 lelling its rail line from Ogden, Utah to Preston, Idaho, for the transportation of passengers, baggage and express.

6. That the resources of the territory served by plaintiff north of Ogden to the Collinston divide, being the northern part of the Salt Lake Valley, and the resources of the Cache Valley hereinbefore referred to are wholly agricultural in character and the only industrial development of which the territory has been or will be capable is the construction and operation of processing plants to enable the agricultural products of the territory to reach the outside market, such as beet sugar factories, vegetable packing plants, milk condensing plants, etc.; that from the time of the construction of the interurban line of railroad heretofore referred to and now owned, controlled and operated by the plaintiff, this industrial development has been fostered by it by collecting the raw products from the fields and delivering them to the processing plants located on its line, and delivering to those plants the materials necessary for such processing from outside the territory served by the plaintiff, such as coal, lime, etc., by transporting by means of its interurban line the processed products from the processing plants and delivering them to the steam railroads for transportation to the outside markets; that by means of its interchange with steam railroads wholly as an initiating or receiving carrier without discrimination as to preference as to which steam railroad is used, plaintiff has also fostered the agricultural development of the territory by delivering to the farms such needed merchandise from the outside, and delivering from said farms to the outside market such agricultural products as could be marketed without being processed; plaintiff has likewise fostered the social development of the territory by

the transportation to and from the farms to the larger communities of the people inhabiting the territory, and especially in the transportation of the school children, thus enabling such schools to be restricted to the larger communities so as to be fully equipped to serve their purposes and yet serving all of the children of the territory equally.

7. To meet these needs of the people of the territory,
23 agricultural, industrial and social, that type of transportation operation which is peculiarly the electric interurban type was and is necessary, namely, short speedy trains operated at frequent intervals, making frequent stops, in many instances where no agents are maintained, for the transportation of both passengers and freight, practically to and from the individual farms, and to and from the processing plants and community centers, and to and from the outside world, to enable the products of the soil to reach their markets either as raw or as processed products, and the products from the outside to reach the farms and processing plants and enable the people of the territory to keep in touch with the outside world.

8. That in harmony with said purposes as above outlined, the interurban line of the plaintiff was constructed and has ever since been maintained and operated, and its physical characteristics are such as to limit its operations to that of an interurban railway; that all of its physical elements, motive power, equipment, track construction, length of spur and sidings, curvature and grades are co-ordinated into an integral whole, which necessitates an operation which is peculiar to interurban electric railroads and that continuously since its construction it has been so operated and that without a complete change of all of its physical elements it could not operate except as an interurban electric railroad and could not be operated as ordinary commercial steam railroads are commonly operated.

9. That Section 1 of the Railway Labor Act defines the term "carrier" as follows:

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or

indirectly owned or controlled by or under common control with any carrier by railroad and which operated any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by rail-
24 road, and any carrier, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'; Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Inter-State Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

10. The plaintiff is an electric interurban railway, as said term is used in and within the purview of said Railway Labor Act; that it is not operated as part of a general steam railroad system of transportation; that none of its stock or securities are owned by any general steam railroad system of transportation, or by any steam railroad company, and no general steam railroad system of transportation, and no steam railroad company, nor any of its officers or agents, have any control of or voice whatever in its management or operation, and plaintiff is exempt from any and all provisions of the said Railway Labor Act.

11. That under the Interstate Commerce Act, Railway Mail Pay Act and other Acts of Congress administered by the Interstate Commerce Commission, the Commission has given the plaintiff and other electric railways a different designation and classification from that given common carriers by railroad subject to the Railway Labor Act, and the Commission as well as various courts and other administrative agencies, State and Federal, have designated plaintiff and similar electric railways as interurban electric railways.

12. That in said Railway Labor Act certain terms are defined, as such terms are therein used, and certain omissions

and acts of commission on the part of the carrier subject thereto, its agents and officers, are made penal offenses, involving heavy fines or imprisonment, or both; that exact copies of the sixth paragraph of Section 1, the third, fourth, fifth, seventh, eighth and tenth paragraphs of Section 2, and Section 6 thereof are hereto attached, marked Exhibit A, hereby referred to and by this reference made a part hereof.

By Section 4, Part of the Railway Labor Act, there is created a board known as the National Mediation Board, which is given certain powers and duties in connection with the administration of said Act. Among such duties and powers is the duty to prescribe the form of notice to carrier employes, as set out in Section 2, Eighth, thereof; that the Mediation Board has heretofore prescribed the form of notice provided for in the eighth paragraph of Section 2 of the Act and ordered that it be posted as therein specified, thereby demanding that all employes be thereby notified that all disputes between the carrier and them will be handled in accordance with the provisions of said Act; that plaintiff has not complied with said order; that if plaintiff continues to fail to comply with said order and otherwise fails to comply with the provisions of said Act, it will subject itself to prosecutions for the penalties hereinbefore set out, notwithstanding that as an interurban electric railroad it is not subject to the provisions thereof; that if it does comply with said order and with the other provisions of said Act, it thereby admits that it is subject to the provisions thereof and thereby voluntarily submits itself to the provisions thereof, notwithstanding it is not subject thereto, and such compliance on the part of the plaintiff, notwithstanding it is not subject thereto, will subject it to immediate and irreparable injury and damage, in that such compliance will unlawfully deprive plaintiff of the liberty of contract and it will be compelled to negotiate with its trainmen and other employes, through a representative or representatives of their own choosing, regardless of who such representative or representatives may be, and regardless of whether such representative or representatives are or are not employes of the plaintiff, and in that such compliance will result in demands for increase of wages on the part of employes, and demands for rules and working conditions with respect thereto that the plaintiff is unable to grant, because its financial condition will not permit it so to do without immediately impairing and ultimately de-

stroying its ability to continue to operate and to serve the public in the manner in which it has served it in the
26 past, and this notwithstanding plaintiff has never had any disputes with its employes which have not been amicably adjusted, and notwithstanding it has continuously operated under contracts with organizations of its employes which are absolutely independent of it and in no wise under its control, as to rates of pay, rules and working conditions, because plaintiff's employes will be influenced to abandon their present organizations and to join those organizations of employes on transcontinental steam railroads throughout the country, on the promise that they will receive the higher or so-called steam railroad standard wages and the different or so-called standard rules and working conditions prevailing thereon, which said organizations represent the employes of said transcontinental steam railroads, and will then demand such higher wages and such different rules and working conditions which prevail on said transcontinental steam railroads, which said wages and rules and working conditions are unwarranted and inapplicable to plaintiff, and if plaintiff refuses to pay such wages and to adopt such rules and working conditions labor disputes and strikes will result, which will inflict such financial losses upon the plaintiff that it will be unable continue to operate and to serve the public in the manner in which it has been doing in the past, and in that under Section 3 of the Act disputes with reference to interpretation of agreements between plaintiff and its employes, and as to grievances of plaintiff's employes against it, and as to the discharge of any of its employes, will have to be submitted to the National Railroad Adjustment Boards which have been operated under said Act without the plaintiff having any part in the selection of the members thereof.

That said Railway Labor Act is unconstitutional, null and void in this, that it attempts to vest in the National Railroad Adjustment Board the right to determine whether or not the plaintiff has the right to discharge its employes and thereby deprive the plaintiff of its liberty of contract and of its property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States; that as claimed, construed and declared by the defendant herein,
27 said Railway Labor Act is unconstitutional, null and void in this, that it vests in the Interstate Commerce

Commission the power and authority to determine whether or not the plaintiff is an interurban railroad and that said determination is final and binding upon this plaintiff, not only in compelling it to comply with the terms of said Act, but is also a final determination of the status of said plaintiff with respect to being an interurban railroad, and that if the said Commission has determined that it is not an interurban railroad, that such determination is final and binding even in criminal actions brought against the said plaintiff, or its officers or agents, as provided in said Act, and as so claimed, interpreted and declared by said defendant said Railway Labor Act deprives the plaintiff and its officers and agents of their liberty and their property without due process of law, and denies to said plaintiff, its officers and agents in said criminal actions the right of trial by jury, and thereby violates the fifth and sixth Amendments to the Constitution of the United States; that said Railway Labor Act is unconstitutional, null and void in this, that as claimed, interpreted and declared by the defendant herein, it attempts to vest in the Interstate Commerce Commission the power and authority to determine whether or not the plaintiff is an interurban railroad without fixing any standard by which said determination shall be made by said Interstate Commerce Commission and is an unwarranted delegation of legislative power by the Congress of the United States to an administrative body, and thereby deprives the plaintiff of due process of law, not only because it thereby vests in the Interstate Commerce Commission power and authority to determine its status with respect to compliance with the provisions of said Act, but also in any criminal actions which will be brought by the defendant against the plaintiff, or its officers or agents, and is in violation of the Fifth Amendment of the Constitution of the United States; that said Railway Labor Act is unconstitutional, null and void in this, that as claimed, construed and declared by the defendant herein it attempts to vest in said Interstate Commerce Commission the power and authority to determine whether or not the plaintiff is an interurban railroad, without fixing any standard by which such determination shall be made by said Interstate Commerce Commission and is an unwarranted delegation of legislative power to an administrative body
28 by the Congress of the United States and thereby deprives the plaintiff of due process of law, not only in the determination of its status with respect to compliance with

the provisions of said Act, but also in criminal actions that will be brought by the defendant against it, or its officers or agents, for the violation of the provisions of said Act, and will thereby deprive said plaintiff and its officers and agents of the right to trial by jury, and is in violation of the Sixth Amendment of the Constitution of the United States; that said Railway Labor Act is unconstitutional, null and void in this, that if the said plaintiff comes within the provisions of said Act, as claimed, interpreted and declared by the defendant herein, then, as hereinbefore alleged, it will result in the destruction of the plaintiff's business and property and will amount to confiscation thereafter without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

13. That the defendant Dan B. Shields, United States Attorney for the District of Utah, is charged by law, said Railway Labor Act, with the enforcement of said Act and with the duty of filing suits and prosecuting plaintiff and its officers and agents under the direction of the Attorney General, for violations of said paragraph of said Section of the Act; and is by law charged with the duty of prosecuting in this District for all crimes and delinquencies cognizable under the authority of the United States; that the defendant has threatened to file suits and prosecute the plaintiff and its officers and agents for the failure upon the part of the plaintiff to comply with the Railway Labor Act, and that unless the relief herein prayed for is granted he will do so; that under the circumstances herein alleged plaintiff is without adequate remedy at law and that it is entitled as of right to immunity from the severe and cumulative penalties pending an orderly and judicial
29 test of the application of said Act to plaintiff, and those particular portions thereof aforesaid, and the question of whether or not it is subject to the provisions of said Act; and in order that such test may be initiated and determined judicially, it should be protected against any prosecution or prosecutions for violation of said penal provisions of said Act, or any of them, pending such judicial determination.

Wherefore plaintiff prays:

1. That this court take jurisdiction of this case and cause appropriate process to issue against the defendant Dan B. Shields, United States Attorney for the District of Utah, and

require him to answer this amended bill of complaint, as required by the rules of this court and as required by law.

2. That pending final hearing herein, the court cause to be issued and served upon the defendants an order to show cause why a temporary injunction should not issue against said defendants and upon the hearing thereof that the court issue a temporary injunction in accordance with the rules of this court enjoining and restraining the defendant from initiating, from prosecuting, and from initiating and prosecuting any suit or suits against the plaintiff, its officers and agents, or any of them, based upon the alleged violation by them, or any of them, of any of the provisions of the Railway Labor Act, or based upon the alleged violation of Section 2 thereof, or either of them; and that upon final hearing said injunction be made final and perpetual; that upon final hearing of this cause, the court shall order, adjudge and decree, pursuant to the provisions of the Federal Declaratory Judgment Act as amended, that said Railway Labor Act is unconstitutional, null and void, and if the same is held valid that the plaintiff is an electric interurban railroad not operating as a part of a general steam-railroad system of transportation, and as such is not subject to the provisions of the Railway Labor Act.

3. That plaintiff shall have such other, further and general or special relief as the nature of the case may require and the Court may deem just and proper in the premises.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

By J. A. Howell, One of its Attorneys, Plaintiff.

30 J. H. DeVine, J. A. Howell, David L. Stine, Attorneys and Solicitors for Plaintiff, 625 Eccles Building, Ogden Utah.

(Duly verified)

Copy of the foregoing Amended Bill of Complaint received this 8th day of September, 1936.

DAN B. SHIELDS, U. S. Attorney,

SCOTT M. MATHESON, Assistant U. S. Attorney
for the District of Utah,
Solicitors for Defendants.

Filed in United States District Court, District of Utah Sep. 8, 1936 W. B. Wilson, Clerk By V. P. Alfistrom, Deputy

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Exhibit A

Article 112, Section 60, of the Revised Civil Statutes of Texas, 1911, reads as follows:

"Article 1121. For what purposes corporations may be formed. The purpose for which private corporations may be formed are:

* * *

"60. The construction, acquiring, maintaining, and operating lines of electric, gas, or gasoline, denatured alcohol, naphtha motor railways within and between any cities or towns, in this state, for the transportation of freight, or passengers, or both, with power, also to construct, own and operate union depots and office buildings. But no electric, gas, or gasoline, denatured alcohol, or naphtha railways, incorporated under this subdivision, shall ever be exempt from the payment of assessments that may be legally levied, or assessed against it for street improvements. Corporations created under this subdivision shall be, and are authorized to exercise the right of eminent domain for the purpose of acquiring right of way upon which to construct their railway lines, and sites, for depots and power plants, upon the same conditions, and in the same manner, as railroad corporations are now required to do under the laws of this state, and shall have the same rights, power and privileges as are now granted to interurban electric railway companies, by Chapter 17, of Title 115, of the Revised Civil Statutes of 1911, passed at the regular session of the thirty-second legislature, and all the powers of whatsoever kind, or character conferred by said chapter; provided no property upon which
31 is located a cemetery shall ever be condemned, unless it shall affirmatively be shown, and so found by the Court trying such condemnation suits, that it is necessary to take such property, and no other route is possible or practicable; and provided that the electric, gas or gasoline, denatured alcohol or naphtha motor railways incorporated under this sub-division, which shall engage in transporting freight shall be subject to the control of the railroad commission, (Acts 1913, p. 67, Sec. 1, amended Acts 1913, p. 349, Sec. 1.)

Amendment to Amended Bill of Complaint for Injunction and Petition for Declaratory Judgment

Your petitioner, the Utah Idaho Central Railroad Company, by leave of Court first had and obtained, makes and files this amendment to the amended bill of complaint for injunction and petition for declaratory judgment herein and respectfully represents and alleges:

In addition to the allegations of paragraph 12 of said amended bill of complaint, and at the end thereof, the following:

That said Railway Labor Act is unconstitutional, null and void in this: That Section 2, Fourth, of said Act provides that representatives selected by a majority of the employes of the carrier in a bargaining unit shall be the exclusive representatives of such employes to bargain with the carrier in matters involving wages, hours of work, and other conditions of employment, and that if the plaintiff is subject to the provisions of said Act, then that thereunder the representatives selected by a majority of the employes of the plaintiff in a bargaining unit shall be the exclusive representatives of such employes to bargain with the plaintiff in matters involving wages, hours of work, and other conditions of employment, and that the attempt of said Act to so provide deprives the carrier of its liberty to contract, and its rights under the Fifth Amendment of the Constitution of the United States, and of its right to negotiate and to make contracts with minority groups
33 of its employes, or with its individual employes; that said Act is unconstitutional, null and void in this, that it attempts to vest in the National Mediation Board created by the Act the power in its discretion to determine the unit of representation to be used in such negotiations and contracts between the carrier and its employes and if said Act is applicable to this plaintiff, said Act and said provision thereof deprives the plaintiff of its right to determine with whom among its employes it shall negotiate and contract, and such provision is arbitrary, capricious and unreasonable, and does not constitute due process of law, and violates the rights of the plaintiff under the Fifth Amendment of the Constitution of the United States.

That said Act, and particularly Section 2, Fourth, thereof, is unconstitutional, null and void and violates the rights of the plaintiff under the Fifth Amendment of the Constitution of

the United States in this: That said Act attempts to prohibit the carrier coming within the provisions of the Act, and therefore the plaintiff, if the Act is applicable to it, from interfering in any way with the organization of its employes or from using its funds in maintaining, assisting or contributing to any other labor organization, labor representative, or other agency for collective bargaining, and makes it unlawful for the plaintiff to influence its employes to join or remain or not to join or remain members of any labor organization, and prohibits the plaintiff from deducting from the wages of employes any dues payable to any labor organization, and forbids the plaintiff from collecting any such dues, and such provisions are unreasonable, arbitrary and capricious and deprive the plaintiff of its right to establish or maintain better relationships with its employes, or to continue by the exercise of its influence or the expenditure of its funds the existence of amicable relations between it and its employes and the labor organizations to which they have for many years belonged, which organizations and amicable relations between them and the plaintiff, as hereinbefore set out, have continued during all the period of plaintiff's existence.

That said Act, and particularly Section 2, Fifth, thereof,
33 is unconstitutional, null and void in this; That it prohibits a carrier, or its officers or agents, from requiring that any person seeking employment sign a contract, by which the prospective employe agrees not to a join a labor organization, and further provides for the abrogation of any such contract as may have been in existence at the time of the passage of said Act, and if said Act is applicable to the plaintiff, then such provision thereby deprives the plaintiff of its liberty to contract with its employes, in violation of the Fifth Amendment of the Constitution of the United States.

That Section 2, Seventh, and Section 6 of said Act requires that carriers and representatives of their employes shall serve at least thirty days written notice of an intended change in agreements between them affecting rates of pay, rules, or working conditions, and prohibits the carrier from changing the rates of pay, rules, or working conditions as provided in the agreements without giving thirty days notice, except in cases where the agreements themselves provide for the change, and if the said Act is applicable to the plaintiff, then such provision is unreasonable, arbitrary and capricious and interferes with the

intiff's liberty of contract, in violation of the Fifth Amend-
nt of the Constitution of the United States, and deprives
plaintiff of due process of law, and bears no real or sub-
ntial relation to interstate commerce.

That said Act and particularly Section 2, Eighth, thereof,
unconstitutional, null and void in this: That it provides
t the carrier shall notify its employes in form to be pre-
ibed by the National Mediation Board that all disputes with
employes shall be handled in accordance with the require-
nts of the Act and that the carrier shall print verbatim in
h notice the 3rd, 4th and 5th paragraphs of Section 2,
ich by paragraph Eighth of said Section are made a part of
contract of employment between the carrier and each em-
ye, and by its express provisions abrogates and nullifies any
existing contracts between the carrier and its employes in
conflict with said paragraphs, which provisions, if ap-
plicable to the plaintiff, are unreasonable, arbitrary and
ricious as to it, and deprive the plaintiff of its rights under
Fifth Amendment of the Constitution of the United States,
d bear no real or substantial relation to interstate com-
rce.

That said Act, and particularly Section 2, Ninth, thereof, is
constitutional, null and void in this: That it provides that
National Mediation Board shall have final authority to
ermine and to certify the identity of qualified representatives
employes and that the carrier shall treat with representa-
es so certified as the representatives of the craft or class of
ployes for the purposes of the Act, and if said Act is ap-
cable to the plaintiff then such provision deprives the plain-
of its rights under the Fifth Amendment of the Constitu-
n of the United States and does not constitute due process of
and is unreasonable, arbitrary and capricious, and bears
real or substantial relation to interstate commerce.

That said Act and particularly Section 3 thereof is uncon-
tutional, null and void in this: That it provides for a sys-
n of National Railroad Adjustment Boards, with jurisdic-
n to try and determine matters of private contract rights
d provides that such determination by the Board of factual
tters shall be final and conclusive, and if the Act is applica-
to the plaintiff, such provision deprives the plaintiff of
right under the Fifth Amendment to the Constitution of the

United States and its liberty to contract as guaranteed thereby, and denies to it due process of law.

That all of the foregoing provisions of said Act are component parts thereof and are inseparable therefore the entire Act is unconstitutional, null and void.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

By J. A. Howell, One of its Attorneys

J. H. DeVine, J. A. Howell, David L. Stine, Attorneys and Solicitors for Plaintiff (Duly verified)

Service of the foregoing amendment admitted and
35 acknowledged this 12th day of October, 1936.

DAN B. SHIELDS,

By Scott M. Matheson, Asst. U. S. Atty.
Solicitor for Defendant.

DANIEL W. KNOWLTON, Chief Counsel.
NELSON THOMAS, Attorney.

Filed in United States District Court, District of Utah October 12, 1936 W. B. Wilson, Clerk By M. S. Sturdevant, Deputy

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Answer

Comes now the defendant, Dan B. Shields, United States Attorney for the District of Utah, and for answer to the Amended bill of Complaint herein, states:

1. Defendant admits the allegations of Paragraph 1 of the bill of complaint.

2. Defendant denies that this suit presents and involves an actual controversy between the plaintiff and defendant. Defendant admits the remaining allegations of Paragraph 2 of the bill of complaint.

3. Defendant is without knowledge concerning the allegations of Paragraph 3 of the bill of complaint.

4. Defendant admits the allegations of Paragraph 4 of the bill of complaint, except that defendant denies that the line of railroad operated by plaintiff is an interurban railroad.

5. Answering Paragraph 5 of the bill of complaint, defendant admits that prior to the year 1914 there was operated in the City of Ogden, in Weber County, State of Utah, a street car system and also a line of railroad running from the north city limits of Ogden City to Hot Springs, Utah, a distance of approximately ten miles; that these properties prior to the year 1914 were acquired by Ogden Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, and electrified as an electric railroad and extended to Brigham City, Box Elder County, State of Utah; that prior to 1914 there was operated in the City of Logan a street car system, which had been electrified and extended as an electric railroad northward to Smithfield, Utah, and southward to Wellsville, Utah, which electric railroad was owned and operated by Logan Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah; that in 1914 the Ogden Rapid
36 Transit Company and the Logan Rapid Transit Company were under the laws of Utah consolidated into a corporation known as Ogden Logan & Idaho Railway Company, which continued to own, control and operate the properties formerly owned and operated by its constituent companies; that the said Ogden Logan & Idaho Railway Company rebuilt that portion of the line running northward from Ogden City to Brigham City, and constructed a new electric line from Brigham City north over the Collinston divide, thus connecting the lines formerly operated by its constituent companies, and also constructed a new line from the northern terminus of the line of the Logan Rapid Transit Company to Preston, Idaho, a distance of six miles north of the Utah line; that the said Ogden Logan & Idaho Railway Company by an amendment to its Articles of Incorporation changed its corporate name to Utah Idaho Central Railroad Company and that the company continued to operate the same lines until 1920, when the city street car system in Ogden City was segregated from the other operations of the company and transferred to the Utah Rapid Transit Company; that the operation of the electric line from Ogden City to Preston, Idaho, and the operation of the street car system in Logan City remained with the Utah Idaho Central Railroad Company until 1926, when that company went through a receivership in this court, which resulted in the properties being acquired by the plaintiff; and that the plaintiff has instituted a bus operation in lieu of the

street car lines in Logan City and has instituted a bus system over the state and county highways substantially paralleling its rail line from Ogden, Utah to Preston, Idaho. Defendant is without knowledge concerning the allegations in paragraph 5 of the bill of complaint not expressly admitted herein.

6. Answering Paragraph 6 of the bill of complaint, defendant admits that the resources of the territory served by plaintiff north of Ogden to the Collinston divide, and the resources of the Cache Valley are agricultural in character and industrial to the extent only of processing agricultural products. The defendant is without knowledge or information sufficient to form a belief as to the activities of the plaintiff in fostering industrial, agricultural and social development in the above mentioned territory as alleged by plaintiff in said Paragraph 6, and therefore, denies the same.

37

7. Defendant is without knowledge concerning the allegations of Paragraph 7 of the bill of complaint.

8. Defendant is without knowledge concerning the allegations of Paragraph 8 of the bill of complaint.

9. Defendant admits the allegations of Paragraph 9 of the bill of complaint.

10. Defendant denies that the plaintiff is an electric interurban railway, as the said term is used in and within the purview of the Railway Labor Act and that the plaintiff is exempt from any and all provisions of the Railway Labor Act. Defendant admits the remaining allegations of Paragraph 10 of the Bill of complaint.

11, Defendant is without knowledge concerning the allegations of Paragraph 11 of the bill of complaint.

12. Defendant avers that the provisions of the Railway Labor Act speak for themselves, and that it is therefore unnecessary to answer the allegations in the first paragraph of Paragraph 12 of the bill of complaint.

Answering the second paragraph of Paragraph 12 of the bill of complaint, defendant admits that the Railway Labor Act creates a board known as the National Mediation Board and gives the said Board certain powers and duties in connection with the administration of the Act; that among such powers and duties is the duty to prescribe the form of notice

to carrier employees, as set out in Section 2, Eighth, of the Act, and that the Mediation Board has prescribed the form of notice provided for in Section 2, Eighth, and ordered that it be posted as therein specified; and that if plaintiff fails to comply with said order and with certain other provisions of the Act, it will be subject to prosecution for the penalties provided in the Act. Defendant has no knowledge concerning the remaining allegations of fact in the second paragraph
38 of Paragraph 12 of the bill of complaint. Defendant is not required to make answer to the conclusions of law in the said paragraph, but nevertheless denies the same.

Answering the third paragraph of Paragraph 12 of said bill of complaint, defendant shows that each and every allegation in the said paragraph is a conclusion of law and that he is not required to make answer thereto, but nevertheless denies the same.

13. Defendant admits that he is charged by law with the enforcement of certain provisions of the Railway Labor Act, as prescribed in Section 2, Tenth, thereof. Defendant denies the remaining allegations of Paragraph 13 of the bill of complaint.

Defendant further avers that he has made no threats to file suit and prosecute the plaintiff, its officers and agents, for their failure to comply with the Railway Labor Act. Paragraph 2, Tenth, of the Act makes it the duty of the defendant, upon the application of any duly designated representative of plaintiff's employees and under the direction of the Attorney General of the United States, to prosecute violations of the Railway Labor Act, but no such application has been made by any representative of plaintiff's employees, and no authorization to prosecute plaintiff has been received from the Attorney General.

Further Answering the Said Bill of Complaint, the defendant states:

14. Section 1, First, of the Railway Labor Act provides, in part, as follows:

Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the

general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Upon the request of the National Mediation Board, proceedings were instituted before the Interstate Commerce Commission to determine whether the plaintiff came within the
39 above proviso exempting certain carriers from the Railway Labor Act. The Commission held a hearing, at which plaintiff was represented, and introduced evidence. On March 18, 1936, the Commission handed down a decision in which it held that the plaintiff's lines "do not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso". A copy of the report of the Commission, printed in 214 I.C.C. 707, is attached hereto as Exhibit A.

15. The Commission's determination that an electric railway does not come within the proviso set forth in the preceding paragraph is controlling unless arbitrary, unreasonable, or not based upon substantial evidence.

16. The bill of complaint contains no allegation that the determination of the Interstate Commerce Commission is arbitrary or unreasonable or unsupported by substantial evidence.

Wherefore Defendant Prays that the injunctive relief sought by plaintiff be denied and that the bill of complaint be dismissed.

DAN B. SHIELDS, United States Attorney.

(Duly verified)

Filed in United States District Court, District of Utah Sept. 16, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Affidavit of Service of Answer of Dan B. Shields

The United States of American, District of Utah,

Central Division, ss.

Winnie Esterak, being first duly sworn upon her oath, deposes and says:

That she is a Clerk in the office of the United States Attorney for the District of Utah; that on September 16, 1936, she served

Answer in the above entitled cause on Plaintiff, The Utah Idaho Central Railroad Company, a corporation, by placing a true copy of said Answer in a franked envelope of the United States addressed to Counsel for said plaintiff as follows, to wit:

DeVine, Howell & Stine,
Attorneys at Law
625 Eccles Building
Ogden, Utah,

and deposited the said envelope in the United States Post Office at Salt Lake City, Utah, for mailing and delivery to said Counsel for said plaintiff.

WINNIE ESTERAK.

Subscribed and sworn to before me this 16th day of September, A. D. 1936. (Seal) W. B. Wilson, Clerk U. S. District Court By Margaret Johnson Deputy

Filed in United States District Court, District of Utah Sep. 16, 1936 W. B. Wilson, Clerk. By V. P. Ahlstrom, Deputy

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Minute Entry—September 16, 1936

At this 16th day of September, 1936, on motion of Scott M. Matheson, Assistant United States Attorney, it is ordered that this case be set for trial October 5, 1936.

Minute Entry—September 26, 1936

At this 26th day of September, 1936, by agreement of counsel it is ordered that this case be set for trial at Ogden, October 12, 1936.

Petition of Interstate Commerce Commission for Leave To Intervene as a Party Defendant

Comes now the Interstate Commerce Commission and respectfully shows that it is a party in interest in the above-styled suit and prays permission to intervene as a party defendant herein, to file its answer hereto attached and to participate in the defense of the above-styled suit as fully and completely as if named a defendant in the amended bill of complaint herein filed, and for its ground for intervention, says:

1. That it is a body politic duly constituted and organ-
41 ized under the laws of the United States and has power to sue and to be sued as a legal entity.

2. That Section 1 of the Railway Labor Act, as quoted in paragraph 9 of the amended bill of complaint authorized and directs the Commission upon request of the National Mediation Board provided for in the Railway Labor Act of May 20, 1926, amended June 21, 1934, to determine after a hearing whether any line of railway operated by electric power falls within the terms of the proviso of said section of said Railway Labor Act which exempts from the operation of said act any street, interurban or suburban electric railway unless such railway is operated as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any motive power other than steam. That pursuant to the aforesaid provisions of said act and upon request of the National Mediation Board, the Commission on May 17, 1935, instituted an investigation to determine the status of the Utah Idaho Central Railroad Company in a proceeding styled Railway Labor Act Docket No. 12, Utah Idaho Central Railroad Company, and held public hearings therein, in which the said railroad company appeared and presented evidence upon the question under investigation. That as a result of said investigation and in accordance with the evidence heard therein, the Commission on March 18, 1936, made its report wherein it found that the Utah Idaho Central Railroad Company's lines do not constitute a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934. Said report is officially reported at 214 I.C.C. 707. That the Commission duly notified the said Mediation Board and the said railroad company of said report and finding.

3. That in the amended bill of complaint filed herein, the plaintiff asserts and alleges as a ground for the relief prayed that its lines constitute a street, interurban or suburban electric
railway within the meaning of the exemption proviso
42 aforesaid and that it is therefore exempt from any and all provisions of the Railway Labor Act. That said averments of said amended bill of complaint are directly contrary to and contradictory of the findings and conclusion of the Commission as set out in said report, and that therefore the

Commission should be permitted to appear as a party defendant and refute and rebut said contentions of the plaintiff and support and maintain its findings and conclusion based upon the evidence taken at the hearing before it as provided by law.

INTERSTATE COMMERCE COMMISSION,

Daniel W. Knowlton,
Nelson Thomas.

Filed in United States District Court, District of Utah Oct 5—1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Order Granting Leave to Interstate Commerce Commission To Intervene as a Party Defendant

Upon consideration of the Petition of the Interstate Commerce Commission for leave to intervene as a party defendant in the above-entitled cause,

It Is Ordered, That said petition be, and the same is hereby, granted with leave to said Commission to participate in said suit as fully and completely as if named a defendant therein.

TILLMAN D. JOHNSON, United States District Judge.

Filed in United States District Court, District of Utah Oct 5—1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Answer of Interstate Commerce Commission

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the
43 amended bill of complaint herein, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I.

Answering paragraphs 1 and 9 of the amended bill of complaint, the Commission admits, for the purposes of this suit, that the facts therein alleged are true.

II.

The Commission alleges that on, to wit, May 17, 1935, pursuant to request of the National Mediation Board, made in accordance with authority conferred upon said Board by Section 1 of the Railway Labor Act, as amended by the Act of June 21, 1934, the Commission instituted a proceeding entitled Railway Labor Act, Docket No. 12, *Utah Idaho Central Railroad Company*, for the purpose of determining whether The Utah Idaho Central Railroad Company was either a street, or an interurban, or a suburban, electric railway, within the meaning of said Section 1 of the Railway Labor Act as amended by said Act of June 21, 1934; and the Commission refers the Court to said Section 1 for full and complete information concerning the language therein contained.

The Commission further alleges that in said proceeding the parties thereto, including the plaintiff herein, were, and that each of them was, accorded the full hearing provided for by said Section 1; that in said hearing a large volume of testimony and other evidence bearing upon the subject matter of inquiry in said proceeding was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein, by the counsel of said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said subject matter were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions submitted to the Court for determination by plaintiff in this suit, whereupon the Commission determined said matters and entered and duly served upon the plaintiff herein, and upon other interested parties, its report of March 18, 1936, the citation of which is 214 I.C.C. 707; that a true copy of said report is attached hereto, as Exhibit A, and made a part hereof; that said report contains the Commission's statements and findings of fact; and that the last paragraph of said report reads as follows:

44

"We find that The Utah Idaho Central Railroad Company's lines do not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934." (Id. 716.)

The Commission further alleges that the findings of fact included in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including many of the matters covered by the allegations contained in said amended bill of complaint.

The Commission further alleges that said report of March 18, 1936, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said report the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said amended bill of complaint.

The Commission especially denies that, as appears to be alleged in paragraph 11 of the amended bill of complaint, the Commission has ever designated plaintiff an interurban electric railway, within the meaning of said Section 1 of the Railway Labor Act.

The Commission denies each of and all the allegations pertaining to unconstitutionality, contained in paragraph
45 12 of the amended bill of complaint, and particularly the allegation that no standard has been prescribed by law for the guidance of the Commission in determining whether plaintiff is an interurban railroad within the meaning of the proviso contained in Section 1 of the Railway Labor Act, as aforesaid.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the amended bill of complaint, in so far as they conflict either with the allegations herein, or with either the statements or findings of fact included in said report of March 18, 1936, which report is hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said amended bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,

By Nelson Thomas, Attorne

Daniel W. Knowlton, Chief Counsel, Of Counsel

(Duly verified)

Filed in United States District Court, District of U
Oct 5—1936 W. B. Wilson, Clerk By V. P. Ahlstrom, De

Exhibit A

Interstate Commerce Commission

Railway Labor Act Docket No. 12

Utah Idaho Central Railroad Company

Submitted February 27, 1936. Decided March 18, 1936

The Utah Idaho Central Railroad Company's lines found not to constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934.

J. H. DeVine, J. A. Howell, and David L. Stine for carr

Ezra Brainerd, Jr., and D. A. MacKenzie for labor organ
tion.

Report of the Commission

Division 3, Commissioners McManamy, Porter, and Mille
McManamy, Commissioner:

This proceeding was instituted at the request of
46 National Mediation Board to determine whether
Utah Idaho Central Railroad Company is exempt fr
the Railway Labor Act as amended June 21, 1934, under
provisio to the first paragraph of section 1 thereof, which re
as follows:

Provided, however, That the term "carrier" shall not incl
any street, interurban, or suburban electric railway, unl
such railway is operating as a part of a general steam-railr
system of transportation, but shall not exclude any part
the general steam-railroad system of transportation now
hereafter operated by any other motive power. The Interst
Commerce Commission is hereby authorized and direct
upon request of the Mediation Board or upon complaint

any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

A hearing has been held at which evidence was introduced on behalf of the above-named railroad company, which contends that it is exempted by the proviso quoted, and its witness was cross-examined by a representative of the Brotherhood of Railroad Trainmen. Briefs have been filed on behalf of the parties named together with the Railway Labor Executives' Association, which joined the Brotherhood of Railway Trainmen in opposing the railroad company's contention. Exceptions were filed by the carrier to the report proposed by the examiner, and the parties were heard in oral argument.

The Railway Labor Act as amended June 21, 1934, provides for the prompt and orderly settlement of disputes between the carriers and their employees. The first paragraph of section 1 thereof defines the term "carrier" as including among others any carrier by railroad subject to the Interstate Commerce Act, which is followed by the proviso hereinbefore quoted. There is no question that the Utah Idaho Central is a carrier by railroad subject to the Interstate Commerce Act, except such sections thereof as contain exemptions somewhat similar to that hereunder consideration. This railway is operated by electric power, and none of its stocks or bonds are owned by any steam railroad. The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso.

In the first case arising under this proviso in the Railway Labor Act, Texas Electric Ry., 208 I. C. C. 193, division 6 said at pages 194, 195:

The amended Railway Labor Act does not indicate the purpose of exempting the class of lines referred to in the proviso to the first section. No reason is apparent for distinguishing between steam and electric power, and the act does not purport to exempt all electric lines. There are other reasons which may have influenced Congress, but we think the fundamental reason was that the lines exempted are essentially local in character and largely disassociated from the steam-railroad systems. This belief is confirmed by reference to the Congressional hearings preceding the passage of this act and other acts containing similar exemptions, which hear-

to

ings are referred to in the briefs and oral argument of both sides.

Previous to the passage of the amendment to the Railway Labor Act on June 21, 1934, this Commission had rendered numerous decisions regarding the status of particular electric lines under somewhat similar exemption provisions in certain sections of the Interstate Commerce Act and other acts which we administer. These decisions recognized the existence of a class of electric railways which are more than street, interurban, or suburban lines, and which are sometimes referred to as commercial railways operated by electric power. Perhaps the best description of what constitutes a street, interurban, or suburban railway was given in Rules for Testing Other Than Steam Power Locomotives, 122 I. C. C. 414, where the Commission said at page 424:

"It is well known that electric cars were at first confined to street service in cities and towns. Gradually the lines were extended to the suburbs. Next came the idea of extending the lines from city to city. These three steps gave rise to the terms street, suburban, and interurban electric railways. These lines were limited almost exclusively to carriage of passengers. They were built largely upon streets and public highways. The only material difference between street, suburban, and interurban lines was the extent of the lines. If the line extended from city to city it was termed an interurban although handling the same traffic and being operated in substantially the same manner as the street or suburban line. We think this is the usual conception of the interurban line today.

"Obviously the character of the lines may change without a change in the name of the operating company. The record here shows that the name of a carrier, whether it is called a railroad, traction system, interurban railway, or power and light company, indicates nothing as to the character of the line or the nature of the traffic handled. We must look to the substance of the matter. A line which today extends only between two cities, and is dependent upon passenger traffic for the bulk of its revenues, might properly be termed an interurban line. In a period of years it might through natural development or consolidation become a railway comparable with our steam railroads and still retain its original name.

would no longer, however, be an interurban railway in bstance and in fact. There would be a point, although not finitely defined, where the line passed beyond the true terurban."

he Utah Idaho Central extends from Ogden, Utah, north to ton, Idaho, a distance of 94.63 miles, with two branch lines pproximately 7 and 14 miles respectively. It also has 36.93 s of siding, spur, and yard tracks, making a total of 152.68 s of track. All of this is within the State of Utah, except t 6 or 7 miles in Idaho, and with the exception of Preston, points herein mentioned are in Utah. The principal cities ed, with their populations, are Odgen 40,272, Brigham 3, Logan 9,979, and Preston 3,381, and 14 other cities or in-orated towns are served, having a population ranging from to 2,353 each. Almost all of the line is in the Great Salt e Valley and the Cache Valley, which are largely agri-ural sections separated by a part of the Wasatch Moun-s. This railway closely parallels the main line of the Oregon rt Line Railroad Company for about 40 miles north of en, and it parallels a branch of the same trunk line for t of the remaining distance to Preston. The number of em-ees averaged about 150 in 1934.

he history of the Utah Idaho Central and its predecessors n about 1890, when 3 or 4 miles of street railway in Ogden e operated with horse-drawn cars. This property was ac-ed by the Ogden Rapid Transit Company in the late ties, which marked the beginning of its electrification, re-ilitation, and expansion. During the same period in the late ties, the Ogden & Northwestern Railroad Company built ne from Ogden to Hot Springs, 9 miles, which it operated a small steam locomotive. About 1910 that line was also ired by the Ogden Rapid Transit Company, which equipped r electrical operation and extended it to Brigham, 21 miles n Ogden. Contemporaneously with this development be-en Ogden and Brigham, the Logan Rapid Transit Company t a street railway in the city of Logan, together with lines mithfield, about 8 miles north, and to Wellsville, 12 miles th, of Logan, all operated with electric power. In 1914 the den Rapid Transit Company and the Logan Rapid Transit mpany were consolidated into one corporation, the Ogden, an & Idaho Railroad Company, which built a connecting from Brigham north over the Collinston Divide to the

southern terminus of the Logan Rapid Transit Company, and also extended the latter's line northward from Smithfield to Preston. In the latter part of 1919, the street-car operations in Ogden and a suburban operation into Ogden Canyon were segregated from the other lines and have since been operated by a separate corporation, th Utah Rapid Transit Company, which is not involved in this proceeding. The name of the Ogden, Logan & Idaho Railroad Company was later changed to the Utah Idaho Central Railroad Company, a Utah corporation, and in 1926 the latter was reorganized as the Utah Idaho Central Railroad Company, a Delaware corporation. In recent years the company has established and operates a motor-bus service parallel to its railway, and it has substituted motor busses for the local street-car service in Logan. The railway was practically entirely financed by citizens of northern Utah, who have to a large extent retained their interest therein, and many of the employees have remained the same through the various corporate changes.

Approximately 81.8 percent of the railway is located on privately owned right-of-way, and the remaining 18.2 percent is located on public streets or highways. The latter includes from 0.19 to 2.02 miles in each of 15 cities and towns, or a total of 14.1 miles, and 6.54 miles of the branch lines are on county roads. In many, if not most, instances the line passes through the cities and towns on their main business streets, and the terminal in Ogden is near the business center. Some of the franchises to use the streets and highways were granted for a street railway, an interurban, or a street and interurban railway to be operated with electricity, compressed air, or liquefied air as motive power, but more of them were granted for the operation of a double-track or single-track railroad, generally with a restriction against the use of steam or other motive power which might scatter sparks or fire. In a few instances the use of steam power was not specifically prohibited, and one franchise authorized its use for the first 25 years, which have now expired. In 1926 the franchises were generally amended to include operation as a common carrier by motor vehicle.

The tracks are of standard gage with 80 miles of 70-pound rail and 11 miles of 65-pound rail on the main line, 20 miles of 45 to 48 pound rail on the branches, and 26 miles of 48-pound rail on the sidings and spurs, the remainder varying from 40

to 85 pounds for comparatively short distances. The ties are 6 by 8 inches and 8 feet long, spaced 2 feet between centers, and only 11.3 miles of the main line are tie-plated. There are 70 places on the main line where the grade breaks or changes, which is an average of nearly one to every mile. The maximum grade is 4.77 percent for one tenth of a mile in the city of Logan, which is necessary to conform with the grade of the street. Outside of that, the maximum grade is 2 percent at several places for an aggregate of 18.9 miles, most of which is encountered in going over the Collinston Divide. The line makes a long circuit in going over the divide, and the sharpest curve on the main line is 12°. The most difficult curves are on the spur tracks where, in at least two instances, there are 60° curves with a radius of 100 feet. On such curves it is often necessary to switch the largest box cars one at a time, but there is no restriction here or elsewhere against steam-railroad freight cars. Steam locomotives, however, could not safely operate over many of the sidings or spur tracks.

The passenger trains consist of either one or two cars, which are self-propelled, and in 1934 they averaged 1.1 cars per train. There are 73 places on 107 miles of line where stops are made for passengers, of which 52 are flag stops. The number of passengers carried in 1934 was 408,634, of which 175,599 were students going to and from centrally located schools at public expense. The passengers handled by train and bus are not shown separately, but in 1934 the number of busses operated average 4.1 per day compared with a daily average of 11.5 passenger trains. No interline tickets are sold except in connection with other electric railways operating in Utah. The average fare paid ranged from 29.6 cents in 1931 to 20.7 cents in 1934. The passenger revenues have declined every year since 1920, those for 1934 being $61,346.25 compared with $448,184.01 in 1920. This has been due primarily to the steadily increasing use of private automobiles, together with the construction of paved highways, particularly one which is 20 miles shorter than the railway between points in the Great Salt Lake Valley and the Cache Valley. The passenger trains carry baggage, mail, and express, which in 1934 yielded $39.48, $2,660.33, and $5,931.50 respectively.

The freight traffic consists to a large extent of raw products such as sugar beets, milk, tomatoes, and peas moving to factories, canneries, or processing plants, and the manufactured

products moving outbound from such plants to connecting railroads. A considerable portion of the raw-products movement requires special service with 1-car or 2-car trains. A daily package-merchandise train is maintained with facilities for refrigeration in summer and heating in winter and with pick-up and delivery service at all available points. In 1934 all of the freight trains averaged 6.2 cars each, and the number of trains per day ranged from an average of 4.4 in March to 14.7 in October with an average of 7.7 throughout the year. During the last half of 1934, this carrier handled 6,354 carloads of freight, of which 2,226 were local and 4,017 were interchanged with other carriers. Of the interchange traffic, 2,075 carloads moved to or from points in Utah and 1,942 to or from points in other States. The traffic originated on this carrier moved to points in 31 States and that delivered by it was from points in 26 States. The commodities originated in greatest volume were beets, sugar, potatoes, sand and gravel, milk, canned goods, tomatoes, sheep, cans, and cattle; and those delivered in greatest volume were beets, coal, sand, gravel, and rock, gasoline, ties, lumber, and poles, and cans. This carrier is a party to practically all of the tariffs publishing through rates to or from this territory, and its interchange traffic generally moves on joint rates. It does not perform any intermediate service between other lines.

The carrier owns five 50-ton electric locomotives and two 35-ton electric locomotives, which are used to haul its freight trains. In addition it has three self-propelled cars which have been constructed and equipped for hauling package freight and can be used to pull other cars when necessary. The largest locomotives have factory ratings ranging up to 1,000 tons on the main line, but their practical ratings are generally 550 to 650 tons, or 12 to 14 cars averaging 45 tons each, except at two or three places where such ratings are only 5 to 8 cars up grade. A helper engine is occasionally used, but that is not the usual practice. A train of empties might have a larger number of cars, but it would be subject to air-brake limitations of 30 cars on the principal grades and 45 cars elsewhere. Four electric power substations have capacities ranging from 500 to 1,000 tons of load on their respective sections of the line. The carrier also owns 100 gondola cars, 22 ballast cars, 18 box cars, 14 flat cars, 12 stock cars, and 7 refrigerator cars; but only 98 of the gondolas and 1 flat car are interchangeable with the steam

railroads, and the gondolas were bought for local service. Practically all of the interchange traffic is therefore handled in standard equipment furnished by connecting railroads. Interchange connections are maintained with all of the trunk lines reaching Ogden, also with the Bamberger Electric Railroad Company at the same point, and with the Oregon Short Line at several other points. There are 84 sidings, spurs, or yard tracks with capacities ranging from 2 to 32 cars and averaging 16 cars.

Freight has always contributed a large proportion of the revenues since the completion of the line in 1915. The freight revenues have exceeded the passenger revenues in every year since 1918, the former being more than double the latter in 1926 and 1927, more than three times in 1928 and 1929, more than four times in 1930 and 1931, more than five times in 1932, and more than six times in 1933 and 1934. During the last five years, from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57, and the revenues from passengers, mail, and express totalled $448,941.62, which amounts were approximately 81.9 and 18.1 percent of the total revenues, respectively. The freight revenues reached a peak in 1920 and a somewhat higher peak in 1928, since which they have generally declined but not so much as the passenger revenues.

The carrier compares its line with the steam railroads in various respects. Although some of the steam railroads have as heavy or heavier grades in crossing the Rocky Mountains and the Sierra Nevada, grades and curves such as this carrier has are always avoided on the transcontinental lines wherever possible. It is admitted that steam railroads also operate along city streets in many places, including Ogden and Salt Lake City, Utah, but they do not use any main business streets in Utah cities. The average capacity of the sidings on this carrier's lines is much less than those on the trunk lines within 200 miles of Ogden, which range from an average of 86 to 114 cars on the various lines. The average length of its trains is also much less than those on the same trunk lines, which in 1934 averaged from 7 to 11 cars in passenger trains and from 45.1 to 63 cars in freight trains. The average cost of operation in 1934 for enginemen and trainmen on the lines of this carrier was 5.1 cents per car-mile in passenger service and 2.59 cents in freight service, which figures are compared with corresponding costs on the trunk lines ranging from 2.64 to 3.74 cents per

car-mile in passenger service and from 0.57 to 1.12 cents in freight service. Similar comparisons are made with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, where the average cost in 1929 for enginemen and trainmen in passenger service was 3.08 cents per car-mile on the electrified section and 4.82 cents on the portion operated with steam power, and the corresponding costs in freight service were 1.01 and 1.16 cents respectively. All of the carrier's comparisons were with trunk lines which handle a large amount of transcontinental freight and passenger business. It would be fairer to compare this carrier with steam railroads of similar size or with branch lines of the larger railroads. It is said that there are no independent steam railroads of comparable size in Utah, but such railroads exist elsewhere, and there are undoubtedly branch lines in this same territory.

The carrier endeavors to distinguish its line from other electric railways which have been found not to be interurbans within the same exemption proviso of the Railway Labor Act in Texas Electric Ry., supra; Sacramento N. Ry., 208 I. C. C. 203; and Waterloo, C. F. & N. Ry., 208 I. C. C. 211. It is pointed out that the Texas Electric Railway performs an intermediate service between steam railroads, that the Sacramento Northern Railway is a subsidiary of the Western Pacific Railroad Company, and that the Waterloo, Cedar Falls & Northern Railway sells interline tickets, maintains off-line solicitors, and filed applications to issue securities under section 20a of the Interstate Commerce Act, which exempts interurbans. However, it does not appear that the physical characteristics of the Utah Idaho Central differ greatly from the above-mentioned electric railways, as disclosed by the reported cited. The maximum grades are 2 percent on the Texas Electric, 4.6 percent on the Sacramento Northern, and 6 percent on the Waterloo, Cedar Falls & Northern. Both the Texas Electric and the Waterloo, Cedar Falls & Northern have curves with a radius of 50 feet, and some of the curves on the Sacramento Northern are too sharp for steam locomotives. The percentage of this carrier's right-of-way that is located on public streets or highways is considerably greater than in the case of the Texas Electric and Sacramento Northern but slightly less than the Waterloo, Cedar Falls & Northern. The freight trains of the Utah Idaho Central average somewhat smaller than those of the other three carriers, but its freight revenue is a larger proportion of the total revenues than on any of the others.

The Utah Idaho Central is paid for carrying the mail at rates prescribed in Electric Railway Mail Pay, 58 I. C. C. 455, 98 I. C. C. 737, under an act applicable to "urban and interurban electric railway common carriers". The same is true of the other electric railways which have been found not to be interurbans within the exemption proviso in the Railway Labor Act, but the Commission has never determined the status of this or the other lines under the above-mentioned mail-pay act. During Federal control the Director General of Railroads addressed a letter to the president of this carrier under date of June 29, 1918, which advised that: "Pursuant to the recommendation of the Regional Director, the Utah Idaho Central is relinquished from Federal control". Notwithstanding this letter, the carrier contends that it was never under Federal control, as no orders, directions, or benefits relative to such control were ever received. For the purposes of this proceeding, it is unnecessary to determine whether the carrier was under Federal control prior to June 29, 1918.

The carrier contends that the number, frequency, and smallness of its trains among other things stamp it as an interurban, but none of these were among the factors which division 6 said are the most important in determining whether an electric railway is an interurban or commercial railway in Texas Electric Ry., supra, at page 202:

The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives, supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. In harmony with that and similar decisions, we are of the opinion that an electric railway which is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue, which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam railroads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric

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power than of an interurban as that term is used in the exemption provision under consideration. Of course, there are many other circumstances and conditions which may have a bearing on the question, and some electric railways are of such an unusual character that their status might depend on other things, but we believe the factors referred to are generally the most important and should be given great weight where all of them exist together.

A petition to reopen that decision was denied by the Commission on May 13, 1935. This carrier's traffic complies in every respect with the above-described characteristics of a commercial railroad operated with electric power.

The Utah Idaho Central was found not to be a street, suburban, or interurban electric railway within a similar exemption provision of the Locomotive Inspection Act in Rules for Testing Other than Steam Power Locomotives, 122 I. C. C. 414. The appendix to that report shows that this carrier's freight revenues were less than double its passenger revenues during the years for which the figures were there given, 1923, 1924, and 1925, whereas the present record shows that its freight revenue was more than six times its passenger revenue in 1933 and 1934. Such previous decisions relating to the status of the same carrier under a similar exemption provision should not be lightly departed from in the absence of changed conditions, and such changes as have taken place with respect to this carrier tend to confirm and strengthen the conclusion that it is not a street, interurban, or suburban railway. See Sacramento N. Ry., supra, and Waterloo, C. F. & N. Ry., supra.

In Piedmont & N. Ry. Co., 211 I. C. C. 4, decided October 11, 1935, division 3 said at page 8:

> Previous to the amendment to the Railway Labor Act on June 21, 1934, this Commission had passed upon the status of numerous electric railways under more or less similar exemption provisions in other acts administered by us. Those decisions recognized a class of electric railways which were regarded as more than interurbans and were sometimes referred to as commercial railways operated by electric power. The distinction between them hinged largely upon the amount and character of freight business handled, an interurban being considered primarily a carrier of passengers and its freight traffic largely local. When Congress authorized this

Commission to determine the status of electric railways under the Railway Labor Act, which is not otherwise administered by us, it is reasonable to suppose that it did so because of our experience in passing upon such questions under similar exemption provisions in other acts. This may also be regarded as a pretty good indication that Congress used the word "interurban" in the same sense as the Commission had interpreted that term in its decisions.

In all of the Commission's decisions dealing with the status of electric railways under the same and similar exemption provisions, it has never found one, which derived so large a proportion of its revenue from freight as this carrier does, to be an interurban.

We find that The Utah Idaho Central Railroad Company's lines do not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934.

Reply to Answer of Defendant

47 Comes now the plaintiff in the above entitled action and by way of reply to the affirmative matters set forth in the answer of the defendant herein, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 14 of said answer.

2. Denies each and every allegation contained in paragraphs 15 and 16 of said answer, and alleges affirmatively that said report of said Interstate Commerce Commission referred to in paragraphs 14, 15 and 16 of said answer and the determination of said Commission in said report, that the plaintiff is not an interurban railroad coming within the proviso of Section 1, First, of the Railway Labor Act, is capricious, arbitrary and unreasonable and not based upon any substantial evidence; that no evidence was introduced at said hearing other than that introduced by the plaintiff herein and said report and determination by said Commission is wholly contrary to said evidence introduced at said hearing before said Commission, and said report is unsupported by an evidence whatever taken at said hearing, and alleges further that said Railway Labor Act is unconstitutional, null and void for the reasons set forth in

paragraph 12 of the amended bill of complaint of the plaintiff herein and the amendment thereto, and if said Railway Labor Act is held to be applicable to this plaintiff by virtue of said report, or otherwise, and plaintiff is required to comply with its provisions, it would, as alleged in plaintiff's said amended bill of complaint and the amendment thereto, constitute irreparable damage and injury and result in the confiscation of plaintiff's business and property, in violation of the Fifth Amendment of the Constitution of the United States.

Wherefore plaintiff prays for the relief demanded in its amended bill of complaint on file herein.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

By J. A. Howell, One of its Attorneys, Plaintiff.

(Duly verified)

Filed in United States District Court, District of Utah Oct 12—1936 W. B. Wilson, Clerk, By V. P. Ahlstrom, Deputy

Service of Reply to answer acknowledged.

DAN B. SHIELDS, by Scott M. Matheson,
Solicitor for Defendant.

Answer and Reply to the Answer of the Interstate Commerce Commission, Intervening Defendant Herein

48 Now comes the plaintiff and by way of answer and reply to the answer of the Interstate Commmerce Commission, intervening defendant, admits, denies and alleges as follows:

1. Admits the allegations of the first paragraph of paragraph II of said Answer.

2. Admits that in said proceeding before the Interstate Commerce Commission referred to, the parties thereto, including this plaintiff, were accorded a full hearing; admits that testimony and other evidence introduced on behalf of the plaintiff was submitted to the Commission for consideration by counsel for said parties; admits that at said hearing and subsequently, both orally and in briefs filed in said proceeding,

e question as to whether the plaintiff is an interurban rail-
ad coming within the proviso of Section 1, First, of the Rail-
ay Labor Act, was fully argued and submitted to the Com-
ission on behalf of said parties by their respective counsel;
dmits that thereafter the Commission made and served upon
e plaintiff its report therein, and admits that a true copy
said report is set out in Exhibit A and made a part of said
swer; admits that the last paragraph of said report is as set
t in said answer; and denies each and every other allegation
ntained in paragraphs II, III, IV and V of said answer and
ncluding at the end of page 3 of said answer, and expressly
leges that said report of said Interstate Commerce Commis-
on was capricious, arbitrary and unjust and contrary to the
ncontradicted evidence therein and is wholly without any evi-
nce to support it; that the only evidence introduced at said
aring was the evidence introduced in behalf of The Utah
daho Central Railroad Company; that no evidence was in-
oduced by any of the other parties thereto in conflict there-
ith, and that said evidence introduced by said plaintiff con-
usively showed that the plaintiff is an interurban railroad,
ming within the provisions of the exemption in Section 1,
rst, of said Railway Labor Act, and notwithstanding such
evidence was uncontradicted and conclusively so shows,
said Interstate Commerce Commission arbitrarily, capri-
ciously and unreasonably made a report to the con-
ary, in violation of the rights of the plaintiff, namely, that
e plaintiff is not an interurban railroad coming within the
oviso exempting it from the operation of said Railway Labor
ct, and said report is not supported by any evidence intro-
ced at said hearing and the same is not binding on this
aintiff.

Plaintiff further alleges that said Railway Labor Act is un-
nstitutional, null and void for the reasons set forth in para-
aph 12 of the amended bill of complaint herein and the
endment thereto, and that if the Railway Labor Act is held
be applicable to this plaintiff by virtue of said report or-
erwise it would result in the confiscation of plaintiff's busi-
s and property, in violation of the Fifth Amendment of the
nstitution of the United States.

Plaintiff reiterates its prayer for the relief demanded in its
ended bill of complaint on file herein.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

By J. A. Howell, One of its Attorneys, Plaintiff.

J. H. DeVine, J. A. Howell, David L. Stine, Attorneys and Solicitors for Plaintiff, 625 Eccles Building, Ogden, Utah.

(Duly verified)

Service by copy of the foregoing answer and reply to the answer of the Interstate Commerce Commission, intervening defendant herein, hereby admitted and acknowledged this 12th day of October, 1936.

DANIEL W. KNOWLTON, Chief Counsel,
NELSON THOMAS, Attorney,
Solicitors for Intervening Defendant.

Filed in United States District Court, District of Utah Oct 12, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Stipulation—October 12, 1936

50 It is stipulated by and between the respective parties to the above entitled suit, by and through their respective attorneys and solicitors, that the same may be transferred from the Central Division to the Northern Division of the above named Court and that all further proceedings in said cause be had in said Northern Division, including the trial thereof and all subsequent proceedings.

Dated: Oct. 12, 1936.

J. H. DeVINE,
J. A. HOWELL,
DAVID L. STINE,
Attorneys and Solicitors for Plaintiff.

DAN B. SHIELDS, United States Attorney for the District of Utah.

By Scott M. Matheson, Asst. U. S. Attorney.

INTERSTATE COMMERCE COMMISSION,
By Nelson Thomas, Its Attorney and solicitor.

Filed in United States District Court, District of Utah Oct 12, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Minute Entry—October 12, 1936

At this 12th day of October, 1936, plaintiff appearing by A. Howell, D. L. Stine and C. D. Cass, its solicitors, de- ndant by Scott M. Matheson, Assistant United States At- rney, and intervening defendant, Interstate Commerce Com- ission by Nelson Thomas, its solicitor, and this case having en by written stipulation transferred from Central to orthern Division for trial and all further proceedings, and w coming on for trial, amendment to amended complaint as filed by leave of court, answer to reply and reply to answer ed and certain documentary evidence was introduced, and on e part of plaintiff P. H. Mulcahy was sworn and examined d the hour of *adjournment* having been reached the *the* rther trial of this case was continued to 10:00 A. M. tomorrow orning the 13th instant.

Minute Entry—October 13, 1936

At this 13th day of October, 1936, come again said parties by their respective solicitors as aforesaid and the trial this case is resumed. Certain documentary evidence was in- oduced and on the part of plaintiff P. H. Mulcahy was re- lled and examined and C. D. Cass and Nelson Thomas were orn and examined and plaintiff rests. Defendant introduced rtain documentary evidence and rested, and the hour of ad- ournment having been reached the further trial of this case as continued to ten A. M. tomorrow morning the 14th instant.

Minute Entry—October 14, 1936

At this 14th day of October, 1936, come again said parties their respective solicitors as aforesaid and the trial of this use is resumed. Certain documentary evidence was intro- uced and Frank Otterstrom and J. A. Howell was sworn and amined and P. H. Mulcahy was recalled and examined and aintiff and defendants rest. The Court heard the arguments counsel to the hour of adjournment when the further trial this case was continued to ten o'clock A. M. tomorrow morn- g the 15th instant.

Minute Entry—October 15, 1936

At this 15th day of October, 1936, come again said parties by eir respective solicitors as aforesaid and the court heard the

further arguments of counsel and found in favor of plaintiff, findings of fact, conclusions of law and decree this day signed and filed to which defendants attorneys duly excepted, and said defendants are given sixty days in which to prepare and serve proposed statement of evidence.

Findings of Fact, Conclusions of Law.

52 Be It Remembered, that the above entitled cause came on before the above named court, before the Honorable Tillman D. Johnson, presiding, at Ogden, Utah, on Monday, the 12th day of October, 1936, pursuant to a written stipulation of the parties on file in said cause transferring the same from the Central Division of said court to the Northern Division thereof, for trial and for all other and further proceedings in said cause upon the issues made by the plaintiff's amended bill of complaint for injunction and petition for declaratory judgment, and the amendment thereto, and the answer of the defendant, and the reply of the plaintiff thereto, and the answer of the intervening defendant, Interstate Commerce Commission, and the answer and reply of the plaintiff thereto, J. H. DeVine, J. A. Howell, David L. Stine, C. D. Cass and Robert E. Quirk appearing as attorneys and solicitors for the plaintiff, Scott M. Matheson, Assistant United States Attorney, appearing as attorney and solicitor for the defendant, and Daniel W. Knowlton and Nelson Thomas appearing as attorneys and *solictors* for the intervening defendant, and the court having heard the evidence introduced by the respective parties and the respective parties having rested their causes, and the court having heard the arguments of counsel for the respective parties, and the matter having been submitted to the court for its decision, now comes the court and makes, enters and files the following findings of fact.

Findings of Fact.

53 1. That plaintiff The Utah Idaho Central Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, of which it is a citizen, qualified under the laws of the States of Utah and Idaho to do business in said States, with its principal office and place of business located in Ogden City, Weber County, State of Utah; that the defendant Dan B. Shields resides in Salt Lake City, Salt Lake County, State of Utah, in the District of Utah,

Central Division, and is the United States Attorney duly appointed, qualified and acting in and for said District of Utah, and he is sued herein individually and as such United States Attorney.

2. That this is a suit in equity of a civil nature, arising under the laws of the United States, and presents and involves an actual controversy between the plaintiff and the defendant, and the matter in controversy as to the plaintiff, exclusive of interest and costs, exceeds the sum of $3,000.00, as will be hereinafter more particularly alleged, and relates to an Act of Congress regulating Interstate Commerce, to wit, "An Act to amend the Railway Labor Act, approved June 21, 1934, entitled: 'An Act to amend the Railway Labor Act, approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employes' ", hereinafter called the Railway Labor Act.

3. That plaintiff brings this suit to prevent irreparable injury and damage to it and its business and property and in the transportation of persons and property and to prevent and restrain the defendant individually and in his official capacity from the threatened enforcement of fines and penalties against the plaintiff and its officers and agents for alleged violation of any of the provisions of the Railway Labor Act and for any alleged failure or refusal on their part respectively to conform to the provisions of said Act.

54 4. That The Utah Idaho Central Railroad Company is engaged in the business of operating as a common carrier an electric interurban line of railroad between Ogden City in the County of Weber, State of Utah, and Preston, in the County of Franklin, State of Idaho, for the transportation of passengers, freight, express and baggage between said terminal points and intermediate points, and is engaged also in the operation as a common carrier of a bus line upon the State and County highways between said terminal points and all intermediate points substantially *parallelling* said line of interurban electric railroad for the transportation of passengers, baggage and express.

5. That prior to the year 1914, there was operated in the City of Ogden, in Weber County, State of Utah, a street car system, and also an interurban line running from the north city limits of Ogden City, to Hot Springs, Utah, a distance of

approximately ten miles. That these properties prior to the year 1914 were acquired by Ogden Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, and electrified as an electric interurban railroad and extended to Brigham City, Box Elder County, State of Utah; that prior to said year 1914, there was operated in the City of Logan a street car system, which prior to said year had been electrified and extended as an interurban railroad northward to Smithfield, Utah, and southward to Wellsville, Utah, which said interurban railroad was owned and operated by Logan Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of Utah; that these city and interurban railroads had been constructed by and were being operated by a group of citizens of northern Utah, interested in the agricultural, industrial and social development of northern Utah and that portion of the State of Idaho which constitutes a part of Cache Valley, which is for the most part located in Utah, and who were
55 desirous of furnishing to that territory as a whole a transportation system which would better serve its needs than the steam railroad operating therein, namely, the Oregon Short Line Railroad, and to that end determined to consolidate the two electric interurban properties above referred to, and accordingly in the year 1914 the said Ogden Rapid Transit Company and said Logan Rapid Transit Company were, under the laws of Utah, consolidated into a corporation known as Ogden Logan & Idaho Railway Company, which continued to own, control and operate the properties formerly owned and operated by its constituent companies and in precisely the same and *idential* manner in which it had been operated by its constituent companies, and rebuilt that portion of the line running northward from Ogden City to Brigham City, and constructed a new electric line from Brigham City north over the Collinston divide, thus connecting the interurban lines formerly operated by its constituent companies, and also constructed a new line from the northern terminus of the line of said Logan Rapid Transit Company to Preston, Idaho, the principal city in the northern part of Cache Valley, a distance of six miles north of the Utah line; that thereafter said Ogden Logan & Idaho Railway Company, which by an amendment of its articles of incorporation changed its corporate name to Utah Idaho Central Railroad Company, continued to own, control and operate the electric street car system in the City of

ogan, and the interurban electric line, which had been de-
eloped out of the electric interurban properties of its con-
ituent companies, in precisely the same manner they had been
perated from the time of their construction, until the year
920, when the city street car system in Ogden City was segre-
ated from the interurban operations of the company and trans-
rred to the Utah Rapid Transit Company; that the operation
f the interurban line from Ogden, Utah, to Preston, Idaho, and
he operation of the street car system in Logan City remained
ith the Utah Idaho Central Railroad Company until the
year 1926, when that company went through a receiver-
6 ship in this court, which resulted in the properties being
acquired by the plaintiff The Utah Idaho Central Rail-
oad Company, and the same have since been owned, controlled
nd operated by said company in precisely the same manner
ney had been operated theretofore since their construction,
xcept that the plaintiff company has instituted a bus opera-
ion in *lieu* of the street car lines in Logan City and has in-
ituted a bus system over the State and County highways sub-
tantially *parallelling* its rail line from Ogden, Utah, to
reston, Idaho, for the transportation of passengers, baggage
nd express.

6. That the resources of the territory served by plaintiff
orth of Ogden to the Collinston divide, being the northern
art of the Salt Lake Valley, and the resources of the Cache
Valley hereinbefore referred to are wholly agricultural in
haracter and the only industrial development of which the
erritory has been or will be capable is the construction and
peration of processing plants to enable the agricultural prod-
cts of the territory to reach the outside market, such as beet
ugar factories, vegetable packing plants, milk condensing
lants, etc.; that from the time of the construction of the
nterurban line of railroad heretofore referred to and now
wned, controlled and operated by the plaintiff, this industrial
levelopment has been fostered by it by collecting the raw
roducts from the fields and delivering them to the processing
lants located on its line, and delivering to those plants the
naterials necessary for such processing from outside the terri-
ory served by the plaintiff, such as coal, lime, etc. by transport-
ing by means of its interurban line the processed products from
the processing plants and delivering them to the steam
57 railroads for transportation to the outside markets;
that by means of its interchange with steam railroads

wholly as an initiating or receiving carrier without discrimination as to preference as to which steam railroad is used, plaintiff has also fostered the agricultural development of the territory by delivering to the farms such needed merchandise from the outside, and delivering from said farms to the outside market such agricultural products as could be marketed without being processed; plaintiff has likewise fostered the social development of the territory by the transportation to and from the farms to the larger communities of the people inhabiting the territory, and especially in the transportation of the school children, thus enabling such schools to be restricted to the larger communities so as to be fully equipped to service their purposes and yet serving all of the children of the territory equally.

7. To meet these needs of the people of the territory, agricultural, industrial and social, that type of transportation operation which is peculiarly the electric interurban type was and is necessary, namely, short speedy trains operated at frequent intervals, making frequent stops, in many instances where no agents are maintained, for the transportation of both passengers and freight, practically to and from the individual farms, and to and from the processing plants and community centers, and to and from the outside world, to enable the products of the soil to reach their market either as raw or as processed products, and the products from the outside to reach the farms and processing plants and enable the people of the territory to keep in touch with the outside world.

8. That in harmony with said purposes as above out-
58 lined, the interurban line of the plaintiff was constructed and has ever since been maintained and operated, and its physical characteristics are such as to limit its operations to that of an interurban railway; that all of its physical elements, motive power, equipment, track construction, length of spur and sidings, curvature and grades are co-ordinated into an integral whole, which necessitates an operation which is peculiar to interurban electric railroads and that continuously since its construction it has been so operated and that without a complete change of all its physical elements it could not operate except as an interurban electric railroad and could not be operated as ordinary commercial steam railroads are commonly operated.

9. That Section 1 of the Railway Labor Act defines the term "carrier" as follows:

Section 1. When used in this Act and for the purposes of this Act:

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property tarnsported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier;' Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

59 10. The plaintiff is a railway operated by electric power and is known as and in fact is now, and ever since its construction has been, an interurban electric railway as said term is used in and within the purview of said Railway Labor Act; that it is not now and never has been operated as a part of a general steam railroad system of transportation, and it is not now and never has been any part of the general steam railroad system of transportation operated by any other motive power; that none of its stock or securities is owned by any general steam railroad system of transportation or by any steam railroad company, and no general steam railroad system of transportation and no steam railroad company, nor any of its officers or agents have any control or voice whatever in its management or operation.

11. That under the Interstate Commerce Act, Railway Mail Pay Act and other Acts of Congress administered by the Inter-

state Commerce Commission, the Commission has given the plaintiff and other electric railways a different designation and classification from that given common carriers by railroad subject to the Railway Labor Act, and the Commission as well as various courts and other administrative agencies, State and Federal, have designated plaintiff and similar electric railways as interurban electric railways.

12. That in said Railway Labor Act certain terms are defined, as such terms are therein used, and certain omissions and acts of commission on the part of the carrier subject thereto, its agents and officers, are made penal offenses, involving heavy fines or imprisonments, or both.

By Section 4, First, of the Railway Labor Act, there is created a board known as the National Mediation Board, which is given certain powers and duties in connection with the administration of said Act. Among such duties and powers is the duty to prescribe the form of notice to carrier employes, as set out in Section 2, Eighth, thereof; that the Mediation Board has heretofore prescribed the form of notice provided for in the eighth paragraph of Section 2 of the Act and ordered that it be posted as therein specified, thereby demanding that all employes be thereby notified that all disputes between the carrier and them will be handled in accordance with the provisions of said Act; that plaintiff has not complied with said order; that if plaintiff continues to fail to comply with said order and otherwise fails to comply with the provisions of said Act, it will subject itself to proseeutions for the penalties hereinbefore set out, notwithstanding that as an interurban electric railroad it is not subject to the provisions thereof; that if it does comply with said order and with the provisions of said Act, it thereby admits that it is subject to the provisions thereof and thereby voluntarily submits itself to the provisions thereof, notwithstanding it is not subject thereto, and such compliance on the part of the plaintiff, notwithstanding it is not subject thereto, will subject it to immediate and irreparable injury and damage, in that such compliance will unlawfully deprive plaintiff of the liberty of contract and it will be compelled to negotiate with its trainmen and other employes, through a representative or representatives of their own choosing, regardless of who such representative or representatives may be, and regardless of whether such representative or representatives are or are not employes of the plaintiff, and in that such compliance will result in

emands for increase of wages on the part of employes, and de-
ands for rules and working conditions with respect thereto
hat the plaintiff is unable to grant, because its financial condi-
ion will not permit it so to do without immediately impairing
nd ultimately destroying its ability to continue to operate and
o serve the public in the manner in which it has served it in
he past, and this notwithstanding plaintiff has never had any
isputes with its employes which have not been amicably ad-
usted, and notwithstanding it has continuously operated under
ontracts with organizations of its employes which are ab-
olutely independent of it and in no wise under its control, as
o rates of pay, rules and working conditions, because plain-
iff's employes will be influenced to abandon their present or-
ganizations and to join those organizations of employes
61 on transcontinental steam railroads throughout the
country, on the promise that they will receive the higher
or so-called steam railroad standard wages and the different
or so-called standard rules and working conditions prevailing
hereon, which said organizations represent the employes of
aid transcontinental steam railroads, and will then demand
uch higher wages and such different rules and working condi-
ions which prevail on said transcontinental steam railroads,
which said wages and rules and working conditions are unwar-
anted and inapplicable to plaintiff, and if plaintiff refuses to
pay such wages and to adopt such rules and working conditions
labor disputes and strikes will result, which will inflict such
financial losses upon the plaintiff that it will be unable to con-
tinue to operate and to serve the public in the manner in which
it has been doing in the past, and in that under Section 3 of
the Act disputes with reference to interpretation of agreements
between plaintiff and its employes, and as to grievances of plain-
tiff's employes against it, and as to the discharge of any of its
employes, will have to be submitted to the National Railroad
Adjustment Boards which have been created under said Act
without the plaintiff having any part in the selection of the mem-
bers thereof.

13. That the defendant Dan B. Shields, United States At-
torney for the District of Utah, is charged by said Railway La-
bor Act with the enforcement of said Act and with the duty of
filing suits and prosecuting plaintiff and its officers and agents
under the direction of the Attorney General, for violation of
said paragraph of said Section of the Act; and is by law charged
with the duty of prosecuting in this District for all crimes and

delinquencies cognizable under the authority of the United States; that the defendant has threatened to file suits and prosecute the plaintiff and its officers and agents for the failure upon the part of the plaintiff to comply with the Railway Labor Act, and that unless the relief herein prayed for is granted he will do so; that under the circumstances herein alleged
62 plaintiff is without adequate remedy at law and that it is *emtitled* as of right to immunity from the severe and cumulative penalties pending an orderly and judicial test of the application of said Act to plaintiff, and those particular portions thereof aforesaid, and the question of whether or not it is subject to the provisions of said Act; and in order that such test may be initiated and determined judicially, it should be protected against any prosecution or prosecutions for violation of said penal provisions of said Act, or any of them, pending such judicial determination.

14. That on the 17th day of May, 1935, pursuant to a request of the National Mediation Board, made in accordance with authority conferred upon said Board by Section 1 of the Railway Labor Act as amended by the Act of June 21, 1934, the intervening defendant, Interstate Commerce Commission, instituted a proceeding entitled; "Railway Labor Act, Docket No. 12, Utah Idaho Central Railroad Company," for the purpose of determining whether the Utah Idaho Central Railroad was either a street, or an interurban, or a suburban, electric railway, within the meaning of said Section 1 of said Railway Labor Act, as amended by said Act of June 21, 1934; that in said proceeding before said Interstate Commerce Commission referred to, the parties thereto, including the plaintiff, were accorded a full hearing; that the only evidence introduced at said hearing was the evidence introduced in behalf of The Utah Idaho Central Railroad Company and that no evidence was introduced by any of the other parties thereto in conflict therewith; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, the question as to whether the plaintiff is an interurban railroad coming within the proviso of Section 1, First, of the Railway Labor Act, was fully argued and submitted to the Commission on behalf of said parties by their respecitve counsel; that thereafter the Commission made and served upon the plaintiff its report therein; that
63 the last paragraph of said report reads as follows:

"We find that the Utah Idaho Central Railroad Company's lines do not constitute a street, interurban or suburban

lectric railway, within the meaning of the exemption proviso
the first paragraph of Section one of the Railway Labor Act,
amended June 21, 1934."

That said uncontradicted evidence of the plaintiff introduced
t said hearing shows and the court finds upon said evidence
nd the transcript of the record of said hearing as introduced
this cause, which is the entire record of evidence before said
Commission at said hearing, that plaintiff is a railway operated
y electric power and is known as, and in fact is now and ever
ince its construction has been an interurban electric railway, as
aid term is used in and within the purview of said Railway La-
or Act; that it is not now and never has been operated as a part
f a general steam railroad system of transportation and it is not
ow and never has been a part of the general steam railroad
ystem of transportation operated by any other motive power,
nd that said determination of said Commission that the plain-
iff does not constitute a street, interurban, or suburban electric
ailway within the meaning of the exemption proviso in the
rst paragraph of Section 1 of the Railway Labor Act, as
mended June 21, 1934, is against and contrary to the law.

From the foregoing Findings of Fact the Court states the
ollowing Conclusions of law:

1. That plaintiff is a railway operated by electric power
nd is known as and in fact is now, and ever since its con-
truction has been, an interurban electric railway as said term
s used in and within the purview of the Railway Labor Act, as
mended June 21, 1934; that it is not now and never has been
perated as a part of a general steam railroad system of trans-
ortation, and it is not now and never has been any part of the
eneral steam railroad system of transportation operated by
ny other motive power; and that plaintiff is exempt from the
roviso of said Railway Labor Act.

2. That the uncontradicted evidence of the plaintiff intro-
duced at said hearing as introduced in this cause, which
is the entire record of evidence before said Commission
at said hearing, shows that plaintiff is a railway operated
y electric power and is known as, and in fact is now and
ver since its construction has been an interurban electric
ailway, as said term is used in and within the purview of
aid Railway Labor Act; that it is not now and never has been
perated as a part of a general steam railroad system of trans-

portation and it is not now and never has been a part of the general steam railroad system of transportation operated by any other motive power, and that said determination of said Commission that the plaintiff does not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, is contrary to and is against the law.

3. That the plaintiff is exempt from all the provisions of said Railway Labor Act, as amended June 21, 1934.

4. That the defendant individually and as United States Attorney for the District of Utah, and all persons acting under, by or through him, be permanently enjoined and restrained from initiating or prosecuting any suit or suits against the plaintiff, its officers or agents, or any of them, based upon the alleged violation by them, or any of them, or any of the provisions of the Railway Labor Act, as amended June 21, 1934, or based upon the alleged violation of Section 2 thereof, or either of them.

Let judgment be entered accordingly.

By The Court

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah Oct 15, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Decree

65 This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

1. That plaintiff is a railway operated by electric power and is known as and in fact is now, and ever since its construction has been, an interurban electric railway as said term is used in and within the purview of the Railway Labor Act, as amended June 21, 1934; that it is not now and never has been operated as a part of a general steam railroad system of transportation, and it is not now and never has been any part of the general steam railroad system of transportation operated by any other motive power; and that plaintiff is exempt from the provisions of said Railway Labor Act.

2. That the uncontradicted evidence of the plaintiff introduced at said hearing as introduced in this cause, which is the entire record of evidence before said Interstate Commerce Commission at said hearing, shows that plaintiff is a railway operated by electric power and is known as, and in fact is now and ever since its construction has been an interurban electric railway, as said term is used in and within the purview of said Railway Labor Act; that it is not now and never has been operated as a part of a general steam railroad system of transportation and it is not now and never has been a part of the general steam railroad system of transportation operated by any other motive power, and that said determination of said Interstate Commerce Commission that the plaintiff does not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, is contrary to and is against the law.

3. That the plaintiff is exempt from all of the provisions of said Railway Labor Act, as amended June 21, 1934.

4. That the defendant individually and as United States Attorney for the District of Utah, and all persons acting under, by or through him, be permanently enjoined and restrained from initiating or prosecuting any suit or suits against the plaintiff, its officers or agents, or any of them, based upon the alleged violation by them, or any of them, of any of the provisions of the Railway Labor Act, as amended June 21, 1934, or based upon the alleged violation of Section thereof, or either of them.

Given and entered this 15th day of October, 1936, in open Court.

By the Court.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah. Oct 15—1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Order—November 23, 1936

Good cause appearing therefor, and on motion of Dan B. Shields, United States Attorney for the District of Utah, and Scott M. Matheson, Assistant United States Attorney for said District,

It Is Hereby Ordered, that the defendant herein, Dan B. Shields, individually and as United States Attorney for the District of Utah, have to and including January 2, 1937, within which to serve and lodge his Bill of Exceptions in the above entitled case.

Dated at Salt Lake City, Utah, this 23d day of November, A. D. 1936.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah Nov 23, 1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Order—December 21, 1936

Good cause appearing therefor, and on motion of Dan B. Shields, United States Attorney for the District of Utah, and Scott M. Matheson, Assistant United States Attorney for said District,

It Is Hereby Ordered, that the defendant herein, Dan
67 B. Shields, individually and as United States Attorney for the District of Utah, have to and including January 30, 1937, within which to serve and lodge his Bill of Exceptions in the above entitled case.

Dated at Salt Lake City, Utah, this 21st day of December, A. D. 1936.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah Dec 21—1936 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Petition for Appeal

To the Honorable Tillman D. Johnson, Judge of the United States District Court for the District of Utah, Northern Division:

Your petitioners, Dan B. Shields and Interstate Commerce Commission, considering themselves aggrieved by the decree entered in the above entitled cause on the fifteenth day of October, 1936, for the reasons specified in the assignment of errors, which is filed herewith, pray that they may be permitted to take an appeal therefrom to the United States Circuit Court of Appeals for the Tenth Circuit; that a citation be issued in

accordance with the law; and that an authenticated transcript of the record, proceedings and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado.

Dated this 12th day of January, 1937.

LEO F. TIERNEY,
Special Assistant to the Attorney General,

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission,

SCOTT M. MATHESON,
Assistant United States Attorney,
Attorneys for Dan B. Shields, Defendant.

NELSON THOMAS,
Assistant Counsel, Interstate Commerce Commission,
Attorneys for Interstate Commerce Commission.

Filed in United States District Court, District of Utah Jan 12—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Order Allowing Appeal

68 The appellants in the above entitled case, and each of them, having prayed for the allowance of an appeal in this cause to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment and decree made and entered in the above entitled suit by the District Court of the United States for the District of Utah, Northern Division, on the fifteenth day of October, 1936, and having presented and filed their petition for appeal, assignment of errors and prayer for reversal.

It Is Ordered that an appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the decree heretofore entered herein be and the same is allowed, and it is further ordered that the clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings, judgment and decree in this cause and transmit the same to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado.

Dated this 12th day of January, 1937.

TILLMAN D. JOHNSON, United States District Judge.

Filed in United States District Court, District of Utah Jan 12—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

Assignment of Errors

Come Now Dan B. Shields, defendant, and Interstate Commerce Commission, intervening defendant, and file the following assignment of errors upon which they will rely upon the appeal to the United States Court of Appeals for the Tenth Circuit from the decree made by this Honorable Court on the fifteenth day of October 1936, in the above entitled cause, and say that this Court erred in the following respects:

1. The Court erred in ordering, adjudging and decreeing the plaintiff to be an interurban electric railway upon evidence independent of the record before the Interstate Commerce Commission because this was in excess of the Court's jurisdiction in that its sole jurisdiction is to detemine whether or
69 not the report and determination of the Interstate Commerce Commission that the plaintiff is not an interurban electric railway is arbitrary or unreasonable or not based upon substantial evidence.

2. The Court erred in ordering, adjudging and decreeing, upon the record before the Interstate Commerce Commission, that the complainant "is not now and never has been operated as a part of a general steam railroad system of transportation and is not now and never has been a part of the general steam railroad system of transportation operated by any other motive power and is exempt from the provisions of the said Railway Labor Act" because the Court obviously was without jurisdiction to make such determination de novo in that Section 1, First, of the Railway Labor Act (45 U. S. C. 51) solely empowers the Interstate Commerce Commission originally to make such a determination, which the Interstate Commerce Commission has not done.

3. The Court erred in *ordered*, adjudging and decreeing the plaintiff to be within the exemption proviso of Section 1 of the Railway Labor Act (45 U. S. C. 51) because it weighed ab initio the evidence before the Interstate Commerce Commission and did not limit its inquiry as to whether or not there was substantial evidence before the Commission to support its determination.

4. The Court erred in finding without any evidence to support the conclusion that the United States Attorney had threatened to prosecute the plaintiff for violations of the Railway Labor Act.

5. The Court erred in enjoining the defendant, United States Attorney, from prosecuting the plaintiff for violations of the Railway Labor Act for the reason that the Court made no finding that there was no substantial evidence before the Interstate Commerce Commission to support its determination that the complainant is not a street, suburban or interurban electric railway within the proviso of Section 1, First, of the Railway Labor Act.

6. The Court erred in ordering, adjudging and decreeing that the plaintiff is exempt from all the provisions of the Railway Labor Act as amended June 1, 1924, for the reason that the Court was without jurisdiction to make such a determination.

Prayer for Reversal

70 Wherefore, and in order that the foregoing assignment of errors may be and appear of record, defendants present the same to the Court and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such case made and provided; and complainants pray that said decree entered on the fifteenth day of October, 1936 be reversed and a decree be entered dismissing plaintiff's bill of complaint.

Dated this 12th day of January, 1937.

LEO F. TIERNEY,
Special Assistant to the Attorney General.

SCOTT M. MATHESON,
Assistant United States Attorney,
Attorneys for Dan B. Shields, Defendant.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

NELSON THOMAS,
Assistant Counsel, Interstate Commerce Commission.
Attorneys for Interstate Commerce Commission.

Filed in United States District Court, District of Utah Jan 12—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Citation On Appeal

The United States of America,

To The Utah-Idaho Central Railroad Company, a corporation and to J. H. DeVine, J. A. Howell and David L. Stine, its attorneys, Greeting:

71 You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Tenth Circuit at the City of Denver, Colorado, forty days from and after the day this citation bears date, pursuant to an appeal from the United States District Court in and for the District of Utah, Northern Division, wherein Dan B. Shields, individually and as United States Attorney for the District of Utah, and the Interstate Commerce Commission are appellants, and you, The Utah-Idaho Central Railroad Company, are appellee, to show cause, if any there be, why the judgment rendered against the said appellants from which said appeal was allowed should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Tillman D. Johnson, Judge of the United States District Court for the District of Utah, this 12th day of January, A. D. 1937.

(Seal) TILLMAN D. JOHNSON, JUDGE.

Attest:

W. B. WILSON, Clerk.

Affidavit Of Service

72 Winnie Esterak, being first duly sworn upon her oath, deposes and says:

That she is a Clerk in the office of the United States Attorney for the District of Utah; that on January 12, 1937, she served Petition for Appeal, Assignment of Errors, Order Allowing Appeal, and Citation on Appeal in the above entitled cause on the Complainant, The Utah-Idaho Central Railroad Company, a corporation, by placing a true copy of said Petition for Appeal, Assignment of Errors, Order Allowing Appeal and Cita-

tion on Appeal in a franked envelope of the United States addressed to Counsel for said The Utah-Idaho Central Railroad Company, as follows, to wit:

Messrs. DeVine, Howell & Stine,
Lawyers,
David Eccles Building,
Ogden, Utah;

and deposited the said *enbelope* in the United States Post Office at Salt Lake City, Utah, for mailing and delivery to said Messrs. DeVine, Howell & Stine, Counsel for said complainant.

(Seal) WINNIE ESTERAK.

Subscribed and sworn to before me this 12th day of January, A. D. 1937. W. B. Wilson, Clerk, United States District Court, For the District of Utah.

Order

Good cause appearing therefor, and on motion of Scott M. Matheson, Assistant United States Attorney for the District of Utah,

It Is Hereby Ordered, that the defendant herein, Dan B. Shields, shall have to and including April 27, 1937, within which to docket his appeal in the United States Circuit Court of Appeals for the Tenth Circuit in the above entitled case.

Dated at Salt Lake City, Utah, this 24 day of March, A. D. 1937.

(Seal) TILLMAN D. JOHNSON, Judge

Attest: W. B. WILSON, Clerk.

By V. P. AHLSTROM, Deputy.

Filed in United States District Court, District of Utah. Mar. 24, 1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Order—January 29, 1937

73 Good cause appearing therefor, and on motion of Dan B. Shields, United States Attorney for the District of Utah, and Scott M. Matheson, Assistant United States Attorney for said District,

It Is Hereby Ordered, that the defendant herein, Dan B. Shields, individually and as United States Attorney for the District of Utah, have to and including, February 15, 1937, within which to serve and lodge his Bill of Exceptions in the above entitled case.

Dated at Salt Lake City, Utah, this 29th day of January, A. D. 1937.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah Jan 29—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Order—February 13, 1937

Good cause appearing therefor, and on motion of Dan B. Shields, United States Attorney for the District of Utah, and Scott M. Matheson, Assistant United States Attorney for said District,

It Is Hereby Ordered, that the defendant herein, Dan B. Shields, individually and as United States Attorney for the District of Utah, have to and including March 10, 1937, within which to serve and lodge his Bill of Exceptions in the above entitled case.

Dated at Salt Lake City, Utah, this 13th day of February, A. D. 1937.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah Feb 13—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Statement of Evidence in Accordance With Equity Rule 75

74 At the hearing of the above-entitled cause before Tillman D. Johnson, Judge of the District Court of the United States for the District of Utah, begun on October 12, 1936, the following proceedings were had, evidence offered and given, rulings made by the Court and exceptions taken by the parties and entered by the Court.

Appearances: Devine, Howell and Stine (Mr. J. A. Howell and Dr. David L. Stine appearing) Mr. C. D. Cass, Mr.

obert E. Quirk, representing the plaintiff. (1)* Mr. Scott . Matheson, Assistant United States Attorney, representing he defendant. Mr. Nelson Thomas, representing the inter-ening defendants. (2)

It was stipulated between counsel for all parties in open court that the case be transferred from the United States District Court for the Central Division to the Northern ivision of Utah.

Plaintiff by leave of court filed an amendment to the amended ill of complaint. (3)

It was thereupon agreed in open court that the answers of he defendant and intervening defendant to the amended bill f complaint, in so far as they applied to paragraph 12 thereof, hould be construed to be answers to the amendment to para-raph 12, it being further understood that the general denial ppearing on page 4 of the intervening defendant's answer to he amended bill of complaint should be taken as applicable lso to the amendment to the amended bill of complaint. (4)

Plaintiff by leave of court filed a reply to the answer of efendant Shields.

Plaintiff by leave of court filed an answer and reply to the nswer of intervening defendant Interstate Commerce Com-ission. (5)

Plaintiff by leave of court was authorized to change the ord "operated" to "create" in paragraph 12, second line from he end of the second paragraph of the amended bill of com-laint. (6)

Thereupon to maintain the issues as joined, the plaintiff and efendants offered in evidence:

P. H. Mulcahy, being called as a witness by and on be-6 half of the plaintiff and having been first duly sworn, testified, in substance, as follows:

I live in Ogden, Utah, and am General Manager of the Utah daho Central Railroad Company, the plaintiff in this suit, aving held that position since 1922. Prior to that time I was ssistant General Manager and Auditor of said company. I as formerly connected with the Southern Pacific Company rom 1911 to 1917. (36)

*Figures in parenthesis indicate pages of official reporter's transcript.

I have prepared and here present a series of exhibits which show the location of and the characteristics of the plaintiff's railroad line.

(Said exhibits were thereupon marked Plaintiff's Exhibits 1 to 28, inclusive)

Mr. Howell: 1 to 28 inclusive. There may be some other exhibits I will have to use on other phases of the case, but on the question of the characteristics of the railroad those are all.

The Court: Then you may proceed, and refer to your exhibits by their number.

Q. (By Mr. Howell): Now, referring to exhibit which has been marked for identification Plaintiff's Exhibit 1, I will ask you, Mr. Mulcahy, what that exhibit is designed to show?

Mr. Matheson: If the court please, on behalf of the defendant Dan B. Shields may it be understood that we may have (37) an objection to any and all testimony and exhibits other than the record which was before the Interstate Commerce Commission and upon which it based its findings of February 27, 1936, in so far as the binding force and effect of the findings of the Commission are concerned in this lawsuit—and an exception?

The Court: No, I would not give you that exception;
77 that is the very thing I am not going to do. I am not going to consider the findings of the Interstate Commerce Commission except upon its own record.

Just like telling a jury this is competent against one person but if you are trying a dozen men together it might be competent as to one.

This evidence is competent as far as it relates to the particular question of the constitutionality of this Act as applied to this defendant.

Mr. Matheson: And not the binding force and effect of the decision of the Commission?

The Court: Hasn't anything to do with that particular case at all.

Mr. Matheson: It is so understood, your Honor,—to preserve our record.

The Court: I have intimated heretofore, as I now view it, if I make any finding with respect to the report of the Interstate Commerce Commission it will be based solely upon what was before them.

As I look at it now, the plaintiff doesn't seem to be interested in that report, at all. (38)

Mr. Howell: Not at the present moment. We are interested in showing that we are an interurban railroad, therefore the Act is not applicable to us. If it is, then it is unconstitutional.

The Witness: Plaintiff's Exhibit No. 1 is a general map of the Utah-Idaho Central Railroad Company, together with its two branch lines.

The map indicates that the line starts at Ogden, Utah, and operates through a portion of Weber, Box Elder and Cache counties, over the Idaho state line into Preston, Franklin country, Idaho, a distance of approximately ninety-five miles.

It has two branch lines, one extending west and south
78 from Lewiston, Utah, to Quinny and Thain, a distance of approximately twelve miles, and another branch line in Weber County extending west from Harrisville through Plain City and Warren, a distance of approximately eight miles.

The map indicates the various cities and town through which this line passes, a brief description of its location in these cities being, the line starts in Ogden, Utah, in the middle of the block between Grant and Lincoln and Twenty-third and Twenty-fourth streets,—the block in which this building is situated, (39)—and extends along a public street known as Lincoln Avenue to the end of that street in Ogden City.

The next town is the town of Willard, and for the entire distance of the line in Willard it occupies a public street, a distance of approximately a mile.

It then runs north into Brigham City and for its entire distance in Brigham City occupies a public street which is four blocks from the main business street of the town and is on the street in the town of Brigham for approximately four miles.

The next small town is Honeyville. The line runs along one of the two only streets in Honeyville for a distance of about a block or a block and a half. It goes over what is known as the Collinston hill and enters Mendon, traverses a public street in

Mendon for the entire length of the city limits, and that street in Mendon is the business street of the town.

79 Goes on in a generally northern direction to Wellsville and enters Wellsville on a public street and makes a sharp right-angle turn on the public street and runs the entire length of the main business street at Wellsville.

The next town north, being Hyrum; operates on a city street of Hyrum for approximately a mile and a half, to the entire distance of the line in Hyrum.

The next town is Millville, upon which the line (40) occupies a public street from the two city limits.

The next town is Providence, where the same condition exists, the public street being occupied.

The next city is the city of Logan, upon which the line occupies the main business street and its residential extension on each side for the entire length of the city limits.

Logan is the fourth largest city in the state of Utah.

The next town is Smithfield. The line occupies the business street of Smithfield for its entire length through the town of approximately two miles.

The next town is Richmond. It occupies a public street for approximately a mile and three-quarters. That public street is about two blocks from the main business street.

The next town is Lewiston, the only town on the line of the road that it enters on private right-of-way, and only occupies a public street for a very short distance.

The next city,—and the last one,—is Preston, Idaho. The road enters the city on the public street and occupies the main business street of the city to its northern terminus, and the terminus of the railroad.

In all of the cities the line is subject to speed regulations generally ranging from twelve to fifteen miles an hour. (41) The Logan speed regulation is twelve miles an hour by ordinance.

In the city of Logan the entire length of our line through the city is on a paved street. As I said before, we occupy the main street, and are subject to the red and green stop and go traffic signals at each of the five blocks in the center of the business

district. We are subject to the same restrictions as automobile traffic.

80 At Smithfield the same condition obtains, only there are only three lights in Smithfield. At that point we are subject to the stop and go signals. And likewise in Smithfield the street is paved where we occupy it.

At Preston the street is also payed.

The Collinston divide is a divide through the mountains from the Salt Lake valley into Cache valley, South of the Collinston divide is the Salt Lake valley, where we are now. And north of the Collinston divide is the Cache valley, which extends a few (42) miles north of Preston, Idaho. That divide is through a spur of the Wasatch mountains. This railroad serves in general the north part of the Salt Lake valley and all the east side of Cache valley. It extends beyond the limits of the Utah state line, between six and seven miles. The only reason for extending beyond the state line is the fact that the Cache valley itself extends beyond the state line. The line was constructed to serve the Cache valley, irrespective of state lines.

Logan is the fourth city of the state. Ogden is the second. Later on, I have an exhibt showing the population of these cities. (43)

There is an exhibit later in the files that shows what percentage of our main line occupies public highways in the city streets.

All of our trains, both passenger and freight trains, move
81 upon these city streets and highways that I have referred to. We have no other lines. We operate, in addition to the railroad, an interurban bus line from Ogden to Preston, Idaho, through Sardine Canyon. Sardine Canyon is located on the map generally by a line straight up from Brigham to Wellsville. In fact, the white dotted line on the map shows the highway over Sardine Canyon. We operate our bus line paralleling our railroad as far as Brigham, through Sardine Canyon to Wellsville, and generally paralleling our railroad to Preston, Idaho.

In addition to that, in the city of Logan we operate a local city urban bus line for the handling of local residents and school supplies to and from the college. Both our railroad as far as Brigham and our bus line parallel substantially the main state

highway north and south, being highway 91. Then our bus line continues on highway 91, but our railroad runs approximately *straight* north and then does not connect up with that highway again until it reaches Wellsville. (44) It then substantially parallels highway 91 all the way into Preston.

In light line is shown the location of the Oregon Short Line Railroad. Their main line, paralleling us generally to the other side of the Collinston divide, and a branch line paralleling us from Cache Junction across the valley as far north as Preston. Cache Junction is shown on the map. It is directly north of Beaver Dam.

The Old Utah Northern—it might have been the Short Line, —but as I understand it, the original Utah Northern route, occupied the route which we now use over Collinston divide, but it was vacated on account of being not adaptable to steam line transportation. It has heavy grades and sharp
82 curvatures. The line ran straight northward through Preston, Idaho, as far as Pocatello. I don't know that that was the occasion for the building of the branch line from Cache Junction. I (45) imagine the northern part of the line is the old Utah Northern Railroad, which was narrow-gauge. I presume the old line in Cache Valley was connected up at Cache Junction with the new line as it proceeded north.

I have an exhibit later on which shows the spur tracks of the railroad. That will show their location on the line and whether or not they are located in cities or towns.

Exhibit 2 are copies of all the county and municipal franchises under which the Utah-Idaho Central operates, showing the various restrictions in those franchises as to the character and type of operation, both city and county. (46) The underscoring in these copies is our own underscoring, in order to emphasize certain restrictive features in the franchises.

The first one in the exhibit is the franchise from the city of Preston, Idaho. In that franchise we are restricted to the operation of the interurban railway only. We are restricted to the use of electricity, compressed air or liquified air as motive power, with the right to maintain poles for the overhead. In section 3 the property is again referred to as an interurban line of railway, and in the same section referred

or interurban electric railway receives more favorable terms, it shall be granted to this company. Section 7 is a straight prohibition against the use of any type of steam motive power.

Mr. Thomas: If the court please, may I submit that
83 this examination has gone far enough now to indicate that the line of inquiry which is being made here has no bearing at all upon the effect of the Labor Act upon this plaintiff, but has a bearing solely upon the character of the railroad as to whether or not it is an electric interurban, and therefore, it is solely an attempt to question and overrule the finding of the Commission.

I submit under the ruling which your Honor has made that you would not interfere with the finding of the Commission (47) except upon the evidence before the Commission, that this evidence should be excluded and all future line of questioning of this kind should be excluded.

The Court: You make the objection?

Mr. Thomas: I make the objection, if the court please.

The Court: The objection will be overruled.

Mr. Thomas: Exception.

The Court: I am not considering it from that standpoint at all.

Mr. Matheson: May the defendant join in that objection, your Honor?

The Court: Yes. I am letting counsel try the case as to the constitutionality of this Act as pleaded without respect to the finding of the Commission.

Mr. Thomas: May I add to my objection that this evidence and this line of evidence has no bearing upon the question of constitutionality, aside from the Commission's ruling, and therefore is irrelevant and immaterial.

The Court: I don't know whether it is or not. I never
84 pass upon that at the beginning of a lawsuit. I decide that later on. I will let counsel introduce and make the case,—whatever he claims has some bearing upon the case.

Mr. Thomas: May it be understood, to save time of the court, that all such evidence is subject to our objection, and the (48) same ruling?

The Court: Yes, if you think that does you any good in an equity case, why, sure,—and an exception.

The Witness: Plaintiff's Exhibit No. 2 shows all the ordinances, both county and city, granting franchises to the plaintiff over the streets and highways of the cities and counties to which they apply, giving the dates of the ordinances and their expiration showing the franchises still in effect. (50)

Plaintiff's Exhibit No. 3 is a historical sketch of the Utah Idaho Central Railroad and its predecessor corporations. The statements contained in said exhibit are those I would make if I were asked to state the history of the plaintiff company. (51) I do not think there is anything about the history of the company that I desire to add to what is stated in said Exhibit No. 3.

Plaintiff's Exhibit No. 4 is a description of the purpose and method of operation of the plaintiff company. If I were asked to describe the purpose and method of the operation of said railroad, my statement would be as set out in Exhibit No. 4. (52)

(It was thereupon agreed in open court by counsel for all parties that said Exhibits Nos. 3 and 4 shall be considered parts of the record the same as if Mr. Mulcahy had testified in open court to the statements therein contained.) (53)

85 The Witness: Plaintiff's Exhibits Nos. 5 to 14, inclusive, constitute a series of exhibits describing the various phases of the physical construction of the plaintiff's property and are designed to show that this interurban railroad is an entirely separate and distinct type of transportation facility distinct from a steam railroad or a bus line, or airplane, or truck line. These exhibits show a coordinated construction with all characteristics and all physical features carrying the same limitations of the interurban type of railroad operation, with the convenience of the interurban type of operation, and likewise the physical construction and the physical restrictions. All these exhibits are actual specific descriptions of the various phases of physical construction of the property.

Exhibit No. 5 is a physical description of the locomotive power of the railroad company. (64)

The facts concerning the subject treated in each exhibit are those which are true concerning the plaintiff's railroad. (65)

(It was thereupon agreed in open court that Exhibits Nos. 5 to 14, inclusive, may be considered as the testimony of the witness respecting the matters therein treated, without going into the contents of said exhibits in detail.) (66)

The Witness: Exhibit No. 5 is a description of the locomotives of the railroad and shows the factory rating of power, in practical language the ability to pull, of those locomotives over the various grades obtaining on the main line of the railroad. (66) The first two columns show the territory involved; the second and third columns the factory rating, and the third and fourth columns the practical rating. The exhibit generally indicates that plaintiff's motive power for the hauling of freight has a minimum practical rating of 275 tons, and a maximum practical rating of 650 tons over two small sections, with a general average rating of only 550 tons, or twelve
86 cars; and that limited by the lower restrictions on account of heavier grades. By "rating" I mean the tonnage that a locomotive will pull. The locomotives will only pull 550 tons, or twelve cars of freight, from the territory starting at Ogden as far north as Brigham City. This is very characteristic of interurban roads as compared with steam roads. (67) Therefore I say that plaintiff's motive power has a direct effect upon the operation of its line so far as its operation as an interurban is concerned. Small electric locomotives are characteristic of interurbans, and produce small trains and more rapid service, high frequency of service. I say that these conditions limit our trains to 12 cars because the average weight over a long period would indicate an approximate gross weight of 45 tons per car, and it is on the basis of that average that we arrive at a limitation of 12.2 cars in the first section of the railroad. Cars containing extremely heavy loads would decrease the average number of cars per train and extremely light loads would increase the number.

Plaintiff's Exhibit No. 6 is a list of the equipment owned by the plaintiff railroad, showing that with the exception of 98 steel gondola cars purchased essentially to haul beets locally (68) practically none of the equipment is interchangeable with other railroads, either because of the type of the equipment or its obsolescent character. This has a bearing upon the question of the interurban character of the plaintiff's line because it is essentially an interurban characteristic to have light, small equipment in freight equipment, and to have equipment not

designed to go out into the general nation-wide system of transportation.

Plaintiff's Exhibit No. 7 is a statement of the equipment and capacity of four sub-stations on plaintiff's line. It is directly related to Exhibit 5, since the size and tonnage capacity
87 of locomotives is directly related to the size and capacity of the sub-stations. Larger locomotives require larger sub-stations, the two units, the unit that furnishes power to the locomotive and the locomotive are coordinated to the 12 car load previously testified to. The sub-stations are coordinated to the locomotives. (69)

Plaintiff's railroad is operated by electric power purchased from the Utah Power and Light Company at a high voltage reduced and transformed through our own motor generating sets in our own sub-stations to 1500 volts D.C., upon which we operate the substation at Ogden. We have sub-stations at Ogden, Hot Springs, Dewey and Smithfield. The substation at Ogden carries a 500 ton load; the Hot Springs station carries a 550 ton load, and the Dewey and Smithfield stations carry a 1000 ton load. There are the same tonnage limits and the same limitation of trains in all the physical characteristics of the railroad.

Plaintiff's Exhibit No. 8 is a statement of the present copper overhead feeder and return circuit. It shows specifically that the size of the copper trolley, the size of the feeder and the capacity of the return circuit are of a size to accommodate the same load which the sub-station will furnish or the locomotive will pull, or, in other words, another step towards coordination and (70) limitation of the operation of the railroad to a small interurban type of railroad. In the exhibit are calculations showing that with a 550 ton northbound train on the Brigham grade and another train at the Hyrum grade, the approximate volts lost between these points and the sub-station is 500 volts. The effective voltage is approximately 1000. This we consider a practical load limit for the present system of conductors. Actual train loads tested in the past have confirmed these calculations quite closely.

The joint resistance of the entire circuit consisting of
88 4/0 copper trolley wire, 7/16" steel catenary cable, 767,000 CM aluminum feeder, 70# steel rail and 4/0 copper bonds is .122 ohms per mile.

The Brigham grade is located 18 miles north of the Ogden sub-station and 17 miles from the Dewey sub-station. A train of 550 tons northbound makes a total power demand of approximately 660 K.W. Reduced to amperes this is $\frac{660,000}{1500}$ or 440 amperes. Amperes or Kilowatts supplied by the respective stations with no other load between Ogden and Dewey is inversely proportioned to the distance the load is from the sub-stations. In this case Dewey will supply 214 amperes times 1500 volts or 320.5 K.W. Ogden portion of this load is (71) 226 amperes times 1500 volts or 339.5 K.W. The volts drop is amperes times miles times ohms per mile or 226 times 18 times .122 which is 470 volts loss from the sub-stations to the locomotive. The effective volts at the locomotive being 1500 minus the volt drop or 1030 volts applied to the locomotive, would impose on that line a heavier train or a heavier locomotive, would increase your volt loss and bring your thousand ton to an impractical figure, or as the example is carried on,—

An attempt to move an eleven hundred ton train up this grade would result in approximately a total power demand of 1320 K.W. Power demand raises in proportion, if the speed is not changed. Amperes would be twice 440, or 880. Portion of current and power furnished would be twice the amount shown for 550 ton train or Dewey 428 amperes or 641 K.W. and Ogden 552 amperes or 679 K.W. Volts drop from the sub-station to the locomotive would be 470 times 2, or 940. The effective volts would be ordinarily 1500 less the 940 or only 560 applied to the motor which would not move the load."

Or, in other words, that is an illustration that the
89 electrical feeder and return circuit are again coordinated with the limiting factor of the locomotive and of the sub-station. (72)

On the Brigham hill we can pull a 12-car train weighing 550 tons, one car up and over that hill, but that is the limit of our capacity. If we wanted to follow that up and get two cars on that grade, they would both stall and you couldn't get either one of them over. If we endeavored to impose twice that load on that hill, every part of our physical construction would be double overloaded. It would paralyze our system.

The whole theory of interurban construction is a transportation unit of limited capacity but capable of frequent service as contradistinguished from a steam railroad where the entire

method of operation points to a high tonnage efficiency, long trains, and high ton miles per locomotive mile. There are two characteristics of the two types of transportation unit. On a level grade a number of cars might be moving that weighed 550 tons; if we are pulling over these hills they cannot be on the hill at the same time. They can only be followed up by a later car of the same weight after the other one had gotten over, and proceed to use up the electric power. (73) If we wanted to operate for the carriage of increased tonnage it would be by additional trains rather than by increasing the length of the trains. The more business, the more trains we run, rather than being able to run big, long trains, like the steam roads do. We have to run additional trains and run them more frequently. This ties into the practical method of operating an interurban, in that if we had 5 cars of potatoes offered to us for
90 movement we have a little locomotive that takes the five cars and moves them right now. The established method of steam operation is that they must of necessity wait for the best loading. Where we will move sugar beets or raw milk, commodities of that type, in trains consisting of one or two cars, frequent service and fast service, it is impossible for a steam railroad operation, with its type of construction and its large rating and its necessity for long trains in order to get efficient operation to perform that service.

That is getting directly to the difference between the interurban type of transportation unit and the steam type of transportation unit. As I said before, they are just as different as trying to compare a highway truck line and a steam railroad, or compare a highway truck line and an interurban railroad. They are three different types of transportation units physically different. (74)

Our electric interurban is just as much different from the Union Pacific steam *railroad* as the truck line that runs along our main highway is different from our line.

Exhibit No. 9 is a short exhibit, showing the weight of rails of which this railroad is constructed. It shows a total mileage, including the main line, sidings and spurs, of one hundred and fifty-two miles.

There are only two miles of 85 pound rail, one mile and a half of 75 pounds, 82 miles of 70 pounds, 15 miles of 65, 3 miles of 60, and 46 miles of 45-48 pounds, and a mile and a half of 40 pounds. That showing a track construction of very light

rail, capable only of accommodating small trains, light locomotives and light loads.

91 Of our entire railroad only 11 miles is tie-plated, and that is in areas where there is heavy curvature. That condition is only possible where you have short locomotives, short trains and light trains, without a heavy imposition of stress or sharp side thrust.

Steam railroads use as high as 110 pounds on their main line. I do not believe there is any main line rail in this intermountain area less than 90 pounds. The great bulk of it is from 100 to 110. (75)

We have one branch line 12 miles long from Lewiston west and south to the Quinny sugar factory, also one branch line from Harrisville west through Plain City to Warren, that are built of 45 pound rail. And generally all of our passing tracks and sidings are built of 45 pound rail. On these hills on the main line, 12 miles of the main line railroad between here and Brigham is 65 pounds and north of Brigham and south of this end is 70 pounds. The only rail we have heavier than 70 pounds is a small section of two miles in the pavement in Smithfield City; that is 85 pounds. That weight was used to hold the pavement struction rather than any necessity of the load imposed on the rail.

Tie plating is a square piece of metal fitting under the rail, between the rail and the tie, in order to form a wider base for the rail to sit on the tie and relieve the stress. The tie plating is attached to the tie and the rail both. (76)

All steam line main lines, practically all the branches, are tie plated. That is necessary on account of the heavy steam power and the longer train.

92 Our ties are 6-8-8 ties, with two-foot spacings, 2640 to the mile. The steam road construction is never less than seven by nine, and generally, in later years, they are using a ten-inch tie. They never use less than nine, where we use an eight—and generally a ten-inch. They use a seven-foot length where we use a six-foot length. That additional material under the rail is required where you are imposing heavier loads on the rail.

The same thing is shown by Exhibit 9 as is shown by the previous exhibits I have mentioned, as limiting the character, along

with the other limitations, of the trains which my line can take care of.

Exhibit No. 10 is a detailed statement of the location of the passing and spur tracks of the railroad, together with their car capacity. It shows that the longest passing track of the railroad is 32 cars long, or has (77) a capacity to accommodate 32 cars, with the average length of our passing tracks sixteen cars. You have developed throughout all of these exhibts a limitation on the size of train by power, size of rail, size of locomotive, size of electrical conductors, and now you have the picture with the passing and side tracks where one train may go by the other, the same limitation in length, with an average length of sixteen cars per track. The length of a steam railroad passing track is usually 75 to 150. That will be brought up just a little later.

Exhibit No. 11 shows another characteristic of interurban operation. It shows out of the total mileage of this railroad 20.64 or 18 per cent of the track lies on public streets or public roads and that 20 per cent is specifically occupied by franchise authority carrying the interurban electric limitations indicated in Exhibit 2. (78)

Exhibt No. 12 are photostatic copies of the station plats
93 on the railroad, showing the degree of curvature from the main line into the yard facilities and the house track facilities of the railroad.

The locomotives on our railroad are only 35 feet long with a 16 foot distance from truck center to truck center. They are particularly designed to accommodate themselves to sharp curvatures.

These station plats show—for instance, the top plat, at Ogden City, shows the turn-out into the terminal yards as a 350 foot radius curve, and two 200 or No. 4 frogs with sharp radius *curva*—can not even be operated by a switch engine of a steam railroad. It is possible for a small switch engine to carefully get around 150 foot radius if it is well guarded and the movement is very slow, which is another physical characteristic of an interurban railroad, sharp curvature right off of the business streets into business property. You could not put any type of a modern steam locomotice around there, except a very small switch engine under a very cautious movement. It would be

impossible to put a passenger car on there at all, one of these common, standard, passenger cars. (79)

Our passenger cars are, I think, 66 feet. As to how long an ordinary passenger car of a steam railroad is, the main difference is their six trucks—the car is some longer, but the main barrier is six trucks on both sides.

No. 4 frog is the angle of the frog. The smallest frog used on steam lines is No. 7, which has roughly about 350 or -60 radius curve, or may accommodate that. The No. 4 is down to about 160 or -70. Those are rough figures, but very close.

The third graph or photostat in this exhibit shows our
94 lead into the American Can Company, which is operated for it on a sixty degree or one hundred foot radius curve. I do not know of any type of steam road equipment that can operate on a curve that sharp.

Throughout this exhibit are many curves, some as low as 100, all No. 4 frogs, which means about 160 or -70, and our maximum, or our flattest curvature into our yard facilities is approximately 260 or 300, and very few of those. On a 100 foot radius curve we have to operate it singly. We can not operate two standard freight cars coupled together unless they are small cars. (80) If you have these large automobile cars or excessively high cars it has to be operated singly.

The American Can spur leads off of Lincoln Avenue into the American Can, about three blocks north of this building, within Ogden City limits.

These graphs show the entrance to our various yards and industrial sidings. Our main line will accommodate as far as curvature is concerned any type of standard freight car. We do not have a switch going out from our main line to the Logan Sugar Factory. We deliver there through interchange; that factory, however, has not operated for some years. We deliver from the interchange at Ogden. We have direct delivery into the Franklin County Sugar Factory at Preston, Idaho, and we deliver from interchange with the Short Line at Lewiston Amalgamated factory, likewise through the interchange at the Brigham Sugar Factory. (81)

Interchange tracks are generally jointly maintained. Each carrier owns part of the track and they maintain their own part.

We have many spur tracks leading to industries, to coal
95 yards, to fruit packing houses, canning plants, warehouses, gasoline stations. We get into the brick plant at Harrisville.

These exhibits show spurs into the canning plants. I think possibly a typical operation with reference to one of the processing plants is shown on the fifth sheet from the last in (82) Exhibit 12 and shows our trackage to the Richmond milk spur. We have on that track a curve to our high line coal spur with a 199-foot radius; another curve sixteen degrees or 359-foot radius. We operate into that Richmond milk plant raw milk that is assembled by the farmer at the Hyrum assembling station, you might say, or at the Preston station, right at this particular time of movement, or from Hyrum to the Richmond milk factory, the fluid milk moving by rail in one-car trains—that is, a passenger motor hauling one car for fast service on account of it being a highly perishable commodity, into the milk plant to be put through the condenser and come out as canned milk. That is a very typical interurban operation, because it requires a one-car train and a high speed movement, and it is quite characteristic of the interurban type of operation.

It is 21 miles from Hyrum to Richmond and on that particular train we do not pick up anything. That is a special service we render; at times of the year that same type of service obtains from Preston down to the Richmond milk plant, (83) 14 miles without any pick-up between, unless there were an emergency where there would be an expedited car at one of those stations to move to the other one. In such case we would pick up. I would say 99 per cent of the time there is nothing moving in the train except the milk.

The spur mentioned is to the Richmond factory of the
96 Sego Milk Products Company; it is a nationally known condensing plant, a subsidiary of the Pet Milk Company. We also take coal into the plant and less-carload shipments and carload shipments of condensed milk out. We take raw products collected from the farms in and the finished processed product out; also take in the materials necessary to process the product. (84) If somebody in Detroit, Mich., has ordered a car of this milk it would be loaded into some of these railroad trains and we would take it to Ogden and deliver it there to the Union Pacific or the Denver & Rio Grande, according to the shipper's routing, making that exchange in Ogden. If it were

going to the northwest we would exchange at Hyrum to the Oregon Short Line. Materials coming in would be similarly interchanged.

Plaintiff's railroad is not in any sense a bridge carrier; we have no bridge carrier rates. All our business is either originated by us or business destined to points in our territory. We do not bridge as between any transcontinental carriers, (85) that is, we are not intermediate on any hauls. A bridge route would be a carload moved from Portland going to Denver, they would give it to us at some place in Cache Valley, we would return it to the steam line at Ogden. We do not and never have done any of that type of business. We have served our own local territory exclusively.

Exhibit No. 13 is a detailed statement showing the elevations, locations, percent of grade and the length of grade. It shows approximately 75 or 80 grade breaks, or points where the percentage of grade on the uphill or the downhill changes. That in itself is another physical interurban characteristic. (86) Grade breaks [illegible] a very slight extent going up a hill on one
87 grade and change to another percentage before we get to the top. More particularly, rather than spending a lot of money in the original construction in leveling the grade out, we have very many places where we come along and will go up a grade for two or three blocks, then down the other side. We climb over just a little knoll. It is possible because our type of operation does not contemplate long, heavy trains, but rather small trains that run up and down these little knolls. The exhibit shows the maximum grade of our railroad to be 4.77; it is not economically sound, but, unfortunately, it is in the middle of the main business street of Logan City. By ordinance we are forced to conform to the street grade. If we were built on private right-of-way we would not leave it there. The other grade breaks, from 2 percent, 1½ per cent, slightly over 2, on this type of railroad are economically sound, I would say. (87) On streets and highways we cannot change the grade. On private right-of-way, if the break is not too severe it doesn't pay to change them. I would say roughly not more than 15 or 18 per cent of our grade breaks are on public streets and highway, though the heaviest ones are. 20.64 miles of plaintiff's road are on public streets or highways, the balance of the right-of-way is privately owned. The total main *lime* distance is 95 miles; the total branch line distance is 18 miles. (88)

Exhibt No. 14 is a profile map of plaintiff's road showing in 10-mile areas, and producing on that profile the factory rating of the railroad, power, and the practical rating. (89) It shows how we practically operate our railroad with its various physical limitations. The first sheet of Exhibit 14 shows the first 10 miles out of Ogden, with 13 grade breaks in that
98 10 miles. The practical operation permits us to haul 12 cars northbound over that area and 14 cars southbound. The second sheet shows the next 10 miles. It takes all the power we can command and all the strength of the type of locomotive we have to operate a 12-car train on that particular portion of the road. Should the cars be lighter than the average weight of 45 tons, or if they are empties, we might handle trains of 14 or 15 or 16 cars. We have to space all our trains within reasonable limits (90) so they are not pulling on a particular sector or hump at the same time. Our steepest grade is over Collinston hill as we go north from Dewey to the summit, and south-bound the heavy grade is from slightly south of Mendon to the summit. On the northbound movement we have a maximum of two percent with a minimum of 1-8-1 adverse grade, with a practical limitation of only 8 cars per train or 350 tons, for a little over 8 miles going north. The other side, coming south, is 6 miles, and has the same general limitations of about 8 cars. (91) The grade is a little heavier coming south but it is a little shorter. We are limited to about 8 cars per train for a distance of about 14 miles. This controls our entire operation and is reflected in our operating averages. When we leave Ogden with 12 cars, unless we can find enough local destination loads this side of the hill we have to double the hill; we stop at Dewey and take half up and go back and get the other half and take it up. The same thing is true with regard to trains coming south. (92)

(Upon application of plaintiff's counsel, for the purpose
99 of avoiding confusion, the Court authorized the erasure from certain exhibits introduced in evidence in this case the words "Before the Interstate Commerce Commission, Re Railway Labor Act, Docket #12, Exhibit No. .....") (93)

Witness Mulcahy resuming: None of the capital stock or securities of the Utah Idaho Central Railroad Company is owned by any steam railroad or any railroad nor by any of the officers or agents of any other railroad. No officer or agent of any other railroad has any say in the manner in which the plaintiff company shall be operated. The plaintiff is an entirely

dependent carrier operated by its own board of directors lected by its own stockholders, which board elects the operat- g officers who operate independently of any other railroad or her influence. Plaintiff has not received any advances or any oney from any railroad company, its officers or agents. (96) our manner of operations we do not give any preference to y railroad at all with whom we may interchange. There is e common carrier truck operator and several contract rrier truck operators in the territory we serve. There is no mmon carrier truck operator north of Brigham City. (97) here is no question but that the development of truck trans- rtation has been much less in the area served by our railroad an in sections of the state served by steam railroad only. at is due, of course, to the character of our service. There s been no substantial change in the construction of our line ce it was originally built or in the method of its operation. e construction of the present line started in 1914 and was cluded the latter part of 1915. That construction work s the joining together of two small street car and interurban lines in Ogden and in Logan. We do not sell any inter- line tickets with any steam railroad and we never have. (98) We sell interline tickets with the electric inter- ban south of us, the Bamberger Electric, and we sell inter- e passenger mileage which is honored on both of the two her interurbans in Utah, namely, the Bamberger Electric d the Salt Lake & Utah Electric. There have been several stances when the bus line I have spoken of is unable to erate in the winter time, because of snow conditions in rdine Canyon. There were maybe three or four such inter- ptions during the last winter, in which cases we substituted e schedule of the bus operation with an interurban passenger ain. We carry light baggage and express on our line and cases of interruption, above referred to, we just transfer ese commodities to a train instead of a bus. We have a mail ate (99) on our interurban passenger trains for restricted rvice, of first-class mail. Our busses carry no mail. United ates pays us under the law and a government schedule cov- ing the mail pay for electric railroads. Our railroad was ssified under the decision as an electric railroad and we are ing paid by the Post Office Department at the schedule set t in the Electric Railway Mail Pay Case of the Interstate mmerce Commission. (100)

(Plaintiff's counsel offers in evidence by reference decisions of the Interstate Commerce Commission in the Electric Railway Mail Pay Cases, 58 I. C. C. 455, 98 I. C. C. 737, of which cases the Court announced it would take judicial notice.)

The Witness: That concludes my testimony relative to Exhibit No. 14. Said series (Exhibits Nos. 5 to 14) are intended to show definitely a limitation of operation due to physical construction peculiar to a transportation unit of our character.

The next series, beginning with Exhibit No. 15, is de-
101 signed to show the practical effect over a period of years of the limitation of operation above referred to. (101) Exhibit No. 15 shows from the years 1932 to 1935, inclusive, by months, the number of passenger trains, passenger busses and freight trains operated over the railroad, and further shows the daily average number. In a summary it shows that during the year 1932 there was an average of 9.7 passenger trains per day, 4.1 passenger busses, and 6.6 freight trains. In the year 1933 the average number of passenger trains was 11, passenger busses 5.6, and freight trains, 9.1. In 1934 the average was 11.5 passenger trains, 4.1 busses and 7.7 freight trains. The year 1935, the average was 9.6 passenger trains, 4.2 passenger busses and 7.8 freight trains. In other words, the limitation of the size of our trains, which is a peculiar characteristic, requires the operation of frequent service or a substantial number of trips per day. That brings in the service advantages of (102) interurban lines in territories adapted for their operation. The exhibit does not show our daily schedule. We can introduce our present daily time cards as to passenger operations. Our freight trains operate daily, but not on time card schedule, and are classified as extra trains, and no time card is published for them. As to freight service our schedule at present is for the same number of trains daily that it has been all the time. The number is reasonably close to the general daily average for a long period of years. There is a substantial decrease in the number of passenger trains due to new highways and increased use of automobiles. We operate a daily merchandise train for the handling of less carload packages in connection with our electric interurban. (103) We furnish store-
102 door delivery service for less carload shipments and have done so for several years,—what is commonly known as pick-up and delivery. This train is operated so the shipper in Salt Lake or Ogden can have the truck of the rail-

road call at his warehouse any time up to the close of business today and have his merchandise delivered to consignee at any place along our territory at the opening of business tomorrow morning, with a like reverse service, every working day of the year. Our daily merchandise train is powered by an interurban passenger car with the windows removed and boarded up and the passenger-carrying space of it used for the handling of package freight. On our merchandise trains just described we have constructed our own ice refrigerator box for the handling of perishable shipments in the summer time. The car is heated in the winter for the handling of shipments affected by the extreme cold. (104)

The general character of our pick-up stuff is vegetables, small packages of drugs, or anything we might ship from the wholesaler to the consignee, processed meats, food stuffs and general merchandise commodites that might move from the wholesalers in Salt Lake and Ogden to consignees in Cache Valley. The reverse movement out of Cache Valley into the markets at Salt Lake and Ogden consist largely of agricultural supplies that are being shipped from farm or processing plants, berries and eggs, poultry, sugar, potatoes, vegetables, melons, slaughtered veal. The large milk production moves to processing plants in Cache Valley. We handle substantial quantities of that through a special milk train operated in Cache Valley, the procedure being that the farmer brings his milk in a can to the central assembling plants at Hyrum or Preston. Our train operates from these (105) assembling plants to the condenser at Richmond.

Exhibit No. 16 is a list of passenger stations on the line
103 between Ogden and its terminal, showing distances and whether or not each is a station agency, the population of the cities and towns where stops are made. Where population is not shown, it is a country road stop. In 107 miles of main line and the Plain City branch upon which we operate passenger service, we have 73 passenger stops, or approximately a stop every mile and a half, the method of operation being that the prospective passenger walks down the country road to the railroad and flags the train, which stops and takes him on. (106) He has to go to one of these stopping places. These stops take in practically every cross road. In a good many stopping places we build a shelter against wind and rain. In practically each city we have an agency station. We operate along the middle

of the street and stop in the middle of the street in front of the station, passengers crossing from the sidewalk across the current of traffic to our train to board it. With the exception of this Ogden station right back of this building we have no other city stops that are not in the middle of the street. We have two other train stops in Ogden going north, these stops being at all the cross streets there are in the city north of the station. (107)

In our bus operation we will stop any place along the highway for the convenience of passengers that is a proper traffic stop. Our passenger operation is an extension of street car service into the country. The only reason stops are wider spaced, as compared with street car operation, is because the density of population is not there. In interurban service we stop at practically each cross road because they are the concentrating points of that area of population. (108)

Our freight operation has almost, but not quite, as many sidings and spurs as we have passenger stops. We average one every three or four miles, which are available for the farmer to load his product for the market or processing plant. The
104 farmer does not bring his stuff over and wait for the train to come along and have the train crew load it. The bulk of agricultural production moves in carload shipments. We have just completed a potato and beet season. We spot appropriate cars at each one of these sidings for the farmer to bring in his potatoes and ship them out in carload lots. Beet dumps are located at strategic points where the farmer delivers his beets and they are loaded in cars and carried away. Farmers' small stuff that is to move in the merchandise train is concentrated in the various agency stations. Except in one or two non-productive areas, we have such an agency station, roughly about every six or seven miles. The farmers' small volumes are concentrated at those stations and loaded there. (109)

In Logan we have a cooling room built into our freight house; in Brigham a refrigerator department. These permit the farmer to bring in perishable commodites in advance of train time, bill them and leave them in this cooling room, from which they are loaded by our employees on to the train. I would say this is a service not ordinarily rendered by steam railroads. We have 16 agency or passenger stations on the line. The rest are non-agency stations. It is not common in steam railroad opera-

a steam railroad train to stop in the center of the street and have the passenger board the train there. (110)

Our occupation of city streets and highways is peculiar to and a characteristic of interurban operation. The purpose is to bring the transportation along the street where the population and the necessity exists, and all interurbans generally are built with that view in mind—stations located along the business street, somewhere in the center of the business section of town.

All our freight and passenger stations are located in the
105 same building, with the exception of two and there the intervening distance is only a few hundred feet. They are located on the main business streets.

At Logan it is quite common to unload merchandise freight from the street and truck it across to our station. (111)

Exhibit No. 17 shows for the five-year period 1931 to 1935 the number of passengers handled, the amount of passenger revenue, and the average fare per passenger on the lines of the Utah Idaho Central Railroad. It shows that in 1931 we handled 489,000 passengers for an average fare of 18.3 cents. In 1932, 407,000 passengers at an average fare of 16.5 cents. In 1933, 366,000 passengers for an average fare of 16.8 cents. In 1934, 408,000 passengers for an average fare of 15 cents. And in 1935 400,000 passengers at an average fare of 16.1 cents. This exhibit demonstrates the fact that an interurban operation, or rather, our operation, is merely one small step ahead of a street car operation. It shows that the average ride of our passengers on our railroad is only a distance of approximately 5 or 6 miles. In other words, they are using these closely-spaced passenger stops in order to avail themselves of frequent (112) service and to move them into the next neighboring community, or from one cross road to the other. The average fare on a street car line is usually from 5½ to 7 cents. Ours is just a little over twice that much. In other words, it is a street car line grown up a little bit. I think the average street car fare over the United States is about eight and a fraction cents.

Exhibit No. 18 classifies the passengers handled on our
106 railroad for the five-year period between so-called regular passengers and school students. A distinct function of our property is the transportation of school children from their residences to central educational institutions. For example, in Cache Valley they only have two county high schools.

and all the students of high school age are taken at the expense of the school board from their homes to those central educational points. We operate what is known as special school train service for the transportation of those students at an extremely low rate of fare.

This exhibit indicates that in 1935 out of a total (113) of 400,000 passengers, 189,000, or slightly less than half, were school students operating on these interurban school trains. In the previous year this school student load was 175,000; in 1933, 174,000; 1932, 185,000, and in 1931, 210,000. In each instance the percentage of school students is between 40 and 50 per cent of the total.

In the regular passenger totals are included full fare passengers, mileage passengers and commutation passengers, our heaviest commutation movement being in Cache Valley, where the residents of the county and the smaller surrounding towns obtain employment in Logan, and we move them from their homes to their places of employment in the morning and back at night, and issue a commutation fare book for that.

Our operation for the school children is a distinct interurban operation. The schools served are located at Hyrum and Richmond, the structures being respectively about 300 and 600 feet from our track. (114) The average fare for the children would be about 6 or 7 cents each way. Both high schools were constructed since our line was built and the location of
107 our line and its facility for handling students had a distinct bearing upon the location of the schools.

Many processing plants have been erected with reference to our line.

The series of exhibits just discussed are designed to show the limiting characteristics of interurban construction and the effect upon our operation.

I now have a series of exhibits showing statistical information with reference to the steam line railroads (115) operating in this same general territory, or rather, in intermountain territory. I have included in this series of steam line exhibits every steam line operating in Utah of which the information was readily available. These exhibits will contrast the steam line construction and operation as compared with ours.

Exhibit No. 19 shows the list of sidings for a distance of 200 miles from Ogden on the Los Angeles & Salt Lake Railroad, the Southern Pacific Railroad, the Oregon Short Line Railroad, the Union Pacific Railroad, and the Denver & Rio Grande Railroad. It will be recalled that an exhibit of this character introduced for the Utah Idaho Central showed the average length of sidings for the accommodation of trains of 16 cars. Exhibit No. 19 shows for the Los Angeles Railroad that the average length of all of their sidings in this 200 mile area is 87 cars, or between 5 and 6 times the length of ours. For the Southern Pacific the average length is 114 cars, or between 7 and 8 times the length of ours. For the Oregon Short Line the average length is 66 cars, or between 5 and 6 times the length of ours. For the Union Pacific the average length is 109 cars (116), or about 7 times the length of ours. For the Denver & Rio Grande the average length is 86 cars, or between 5 and 6 times the length of ours.

The increased length of cars on steam road tracks is to
108 accommodate long steam road trains. For the same reason, the restricted length of ours is to accommodate short interuban trains. I might add, in connection with this exhibit, it is generally true of all roads, but I have just counted the number of sidings on the first 200 miles of the Los Angeles Railroad and there are 35. On the 95 miles of our main line we have practically double that number, in half the mileage.

The comparison of passenger stops would be much more out of line. Our passenger stops average about every mile and a half; on the average steam railroad they will not average one in 20 miles. In this western country we have distances as high as 40 or 50 miles between steam railroad passenger stops. (117).

Exhibits Nos. 20 and 21 are designed to show actual comparison in operating results and operating costs between a steam railroad and an electric interurban railroad. The exhibits bring out clearly such a wide difference in operating results as to indicate that the same type of regulation, labor or otherwise, is not appropriate or applicable, one type of transportation unit to the other.

Exhibit No. 20 shows for the Union Pacific, Oregon Short Line, Los Angeles & Salt Lake, Southern Pacific Company, Denver & Rio Grande and our own railroad the number of

freight train miles—freight car miles, and the amount of wages for enginemen and *trainmen*. In each of these cases it is produced down to the actual length of the average freight train on these various railroads, and the actual cost in cents of *enginemen* and *trainmen* service for handling those trains. The average length of train and cost of enginemen and trainmen above referred to are over the entire railroad obtained from their official figures filed with he Public Utilities Commis-
109 sion of Utah. (118) Each of the constituent units of the Union Pacific System are taken separately, both branches and main line.

For the year 1935 the average length of a freight train on the Union Pacific was 60 cars; the average cost for trainmen's service was .65 of a cent per car mile. The average cost for labor service for each car mile moved. On the Oregon Short Line, their average train length was 48 cars; their cost, 1.01 cents per mile. For the Los Angeles & Salt Lake the average train length was 48.3 cars; average cost, 1.21 cents. For the Southern Pacific average train length was 56.6 cars; average cost, 1.08 cents. For the Denver & Rio Grande, average train length was 42.4 cars; average cost was 1.28 cents. For the Utah Idaho Central, the average freight car length was only six and a half cars; average cost, two and a half cents per car mile. (119) As compared with the first of the exhibit, the Union Pacific, our train length was approximately one-tenth of theirs, and our labor cost for transporting each car one mile was just about four times greater than theirs. That clearly demonstrates the absolute difference in labor conditions, type of labor, type of operation. Were you to attempt to impose on an interurban railroad the same type of labor regulations that you impose on a steam railroad, with its consequent full crew requirements, etc., you would create a labor cost on an interurban railroad that would be prohibitory to operate under. That would be true of our road. With our different type of labor crew, still our labor cost per car mile is four times that of the Union Pacific.

We require on our one and two car passenger operation
110 a motorman and conductor. The steam railroad passenger operation will run (120) from 10 to 15 cars. They require an engineer, fireman, conductor, flagman and a brakeman, or five men. On our one-car operation, if we were required to accept that type of employee personnel, it would

almost take up the passenger room, and nothing for them to do. On our railroad a one-car passenger train has two men on it. We have no block signals and no operation with less than two men. On our maximum freight trains we have four men, motorman, conductor, brakeman and trolley man. In many of our freight operations, where the unit consists of a power unit and one car, we operate with two men. On some of our little larger local operations we operate with three men, motorman, conductor and brakeman, the motorman or the brakeman then being trolley man also. (121) My recollection is that the minimum requirement on a large steam railroad is six men for freight trains. Nevada has a law that a steam railroad may not carry more than 75 cars in one train. I do not believe they have a full crew law. The Brotherhood *agreements* with these steam railroad carriers, however, generally carry a clause as to the minimum number of men permitted. (122) A full crew of a passenger train is an engineer, fireman, conductor and two brakemen. On a freight train my understanding is that the minimum is six men. A six-man crew would be the conductor and three brakemen and the two men of the engine crew.

I have just compared for the year 1935, and the preceding years generally paint the same picture on the freight operation of these railroads.

Now, as far as passenger operation is concerned, for the year 1935, the average length of their passenger trains was 10.7 cars, with an average cost of 2.86 cents per car mile.
111 The Oregon Short Line, 8.6 cars, average cost, 3.75 cents per car mile. The Los Angeles & Salt Lake Railroad, average length 10.7, average cost of 3.22 cents per car mile. The Southern Pacific, average length of 10.3, average cost, 3.32 cents per car mile. The Rio Grande, average length of 7.2, (123) average cost, 3.89 cents per car mile. On the Utah Idaho Central the average length is 1.1 cars, and our cost for trainmen's service, 4.9 cents per car mile. To compare that with the Union Pacific Railroad, our trains are .1 long, and our labor cost per car mile is almost double.

There is a type of electric railroad that is common and similar to the steam railroads; that is a type of road that is no doubt referred to in the law as a steam railroad operated by another type of power.

With that thought in mind I have an exhibit, No. 21, a comparison between the steam operation and the electric operation of the Chicago, Milwaukee & St. Paul, which is a western road, a substantial portion of which has been electrified and turned into an electric railroad of a character to conduct a general steam railroad business. The practical result of that type of electrification is shown in Exhibit 21, where on the Chicago & Milwaukee for the year 1929, the first year of the exhibit, the average length of the trains on their steam operation is 45.8 cars and on their electric operation 72.6. Their labor cost on their steam operation is 1.16 cents, and on their electric operation, 1.01 cents. In other words, there can be an electric railway that is identical and from these figures practically more efficient than a steam operation. (124) In the Milwaukee operation they were operating longer trains
112 for a less cost than on their steam operation. That is a type of electric railroad absolutely separate and distinct from the interurban type, which the Utah Idaho Central is.

The Chicago & Milwaukee line is operated east and west of Montana for a distance of four or five hundred miles, and into and through Montana. They have a very large electric engine; some of them with self-generating features; the size of their engines compared with our electric engines would be about ten to one. They have very heavy transmission supply lines. My impression is that the voltage on the Milwaukee is 22 or 2300. Whether the voltage is 1500 or 750 or 2300 is not particularly a limiting factor. It depends upon the amount you can furnish and you can consume (125), and the type of conductor as to the resistance set up and the line losses and other losses.

The Milwaukee has a panagraph system instead of using a trolley pole; it is a cage-looking affair almost as wide as the locomotive and is raised and lowered through mechanical pressure. There is an overhead wire which, instead of being confined during operation to the limits of the wheel, has this big wide panagraph shoe which permits of the movement back and forth across that shoe. The Milwaukee is able to pull larger trains with their electric operation than their steam operation. They have a higher average, gets more power out of the electric engine. (126) The Milwaukee changed from steam to electricity. Except changes required in the installation of electric operation, the Milwaukee still maintains the same number of employees.

The statute specifically refers to a steam railroad which
113 operates with another type of power—any other type of power.

I believe the Pennsylvania is now electrifying its line into Washington. There are quite a few of such roads in the vicinity of New York. I guess there are many cases throughout the country.

The law (the Labor Act) was originally passed in 1926 with the same type of exclusion clause, and at that time the (127) Milwaukee had been converted to electrical operation and I think conversion work had been done on some of the eastern lines. (128)

I contrasted the freight operation between the Milwaukee steam railroad and the Milwaukee electrified railroad. The passenger comparison is the same characteristic.

The average length of a passenger train on their steam operation was six cars with a cost per car mile of 4.82 cents. And on their electric operation the average length was 10.1 cars, with a cost of 3.08 cents per car mile, showing the same effect of electrifying a steam railroad. (130) The electrified portion of the Milwaukee handles longer trains at a less cost per car mile than the steam portion.

In the next four exhibits, graphs, I bring out very distinctly the comparison of the operation of the electrified portion of the Milwaukee with our line. Exhibits 22, 23, 24 and 25 are graphs setting out the actual operating results compared with steam railroads, electrified steam railroads and the Utah Idaho Central.

The first graph shows the average train length over the years covered by the exhibit. The longest average train length on the graph is the electrified Milwaukee. The very small
114 column on the extreme right of each year is the Utah Idaho Central train length as compared with the average train lengths of all of these other carriers shown in the various colors. That pictures more clearly than any other evidence we have offered as to the absolute difference in the type of operation, the absolute difference in the labor requirements, the difference in the skill and knowledge required of train employees on an interurban railroad as compared with a steam railroad. The very difference in the requirements and in the method of

operation obviously indicates that a different type (131) of contract negotiations is necessary.

The second exhibit, No. 23, shows the same information graphed for passenger operation, with the highest column being electrified steam operation, the other large columns the other steam operations in the territory surrounding this carrier, and the very small column on the right the size of the Utah Idaho Central trains.

Exhibit No. 24 is the graphing of the cost of train men. This is just the reverse, in that the very large column, or the high cost, is the cost per car mile on the Utah Idaho Central, and the smaller columns are the cost per car mile on the steam railroads.

Exhibit No. 25 is the graphed comparison of the cost on passenger service, with the larger columns the labor cost per car mile on passenger service—or with the larger cost the cost on the Utah Idaho Central, and the smaller columns the cost on the steam roads.

Our rates per hour are lower than the rates on the steam railroad. The number of men on our crews is smaller; the rates are lower and the crews are smaller by reason of the lack of experience and ability on our operation as compared
115 with the steam road operation. And then one very substantial factor that enters into the costs is the (132) many, and to my mind extreme, penalties for different types of work and different character of service required in the labor contracts of the steam railroads as compared with ours.

The labor contracts on interurban railroads are essentially based on the principle that a man is paid for the amount of hours he works according to his ability to perform the job assigned to him, while on steam railroads the labor contracts have very many technical and unusual conditions as conditions whereby a man might at the same time be paid for two different services although he just uses one unit of time in order to perform the two. By reason of the penalties in the contract he can be drawing, for example, road pay and switching pay during the same simultaneous hour. He only puts in one hour's work, he is paid under the schedule for those two services. We have no turns of that character at all. On interurban electric railroads we pay the man per hour according to the job he does, and for the number of hours he does it. (133)

The characteristic of our operation is short trains frequently run with a maximum of service to the customer, and it produces a high labor cost per unit, and for the general operation of the interurban, all the other operating factors involved, it produces a reasonable and I might say comparable total operating cost. It is that very type of service that raises our labor cost per car mile or per train mile that makes us an interurban, and that very fact means that if you would take the type of labor relations and labor contracts off of the steam railroad and try to force them on these little interurban operations,
116 you would then produce a labor cost that would be practically confiscatory. In other words, where our costs now, as I *recall*, are better than four times the unit cost of the Union Pacific, if we would attempt to impose upon our railroad the same type of steam railroad labor contract as is imposed on the Union Pacific, it would double our costs, maybe two or three times more. It would add from 100 to 200 per cent more to our labor cost and create an impossible situation. (134) In comparison to our present cost of $3.00 to $1.50 on a steam railroad it would impose on us a cost of $6.00 or $7.00, compared with $1.50 on a steam railroad. As a practical proposition such cost would at the present time put us much further in the red, so that the continuance of our operation would be seriously jeopardized. We have been in the red during the depression but were not prior thereto.

Q. (By Mr. Howell): Do you know if the wages paid on the steam railroads in this territory are standard with those paid on steam railroads throughout the country?

Mr. Matheson: If your Honor please, in behalf of the defendant we would like to object to the question, because it is based upon an assumption that if the road were subjected to the provisions of the Act the same schedules and contracts—labor contracts,—would be imposed upon this road that are imposed upon a steam railroad.

Mr. Howell: That is what I am going to prove a little later.

Mr. Matheson: We object to it on that basis, because that (135) is merely an assumption, and not borne out by the provisions of the Act.

The Court: I don't know what might result. You
117 claim that would be the practical result of it in the outcome, so you can go ahead.

The objection will be overruled.

Mr. Matheson: Exception.

(Thereupon the last preceding question was read by the reporter.)

The Witness: They are the western standard, I think possibly a little higher than the southeast portion of the country and fairly comparable with the east. There is not a great divergence between the basic standards. (136)

I would say very definitely that in normal conditions under our present method of interurban operation it is my opinion that we can operate in the black and keep out of receivership, but I am very definite in the opinion that the imposition upon this property of the type of labor regulations—and this is an opinion—implied by the Railway Labor Act—and exemplified to us since an attempt to impose that Act has been made upon us, would render very serious the question as to whether even in normally good times this railroad could operate without a receivership and consequent insolvency.

When this law was passed in 1926 the Railway Labor Board then in charge of the administration of the law, with an exception in the law identical to the one that is there today, ruled that this railroad and railroads of this character were interurban railroads and it was not the intent of Congress to subject the properties to that type of—I would hate to wager a guess on the number of units there were of that type in operation at that time. (137) There were a great many. There were such railroads in almost every community in the United States, in the more populous areas.

I think a discussion before the Congressional committee made it quite plain what Congress had in mind when it made the exception to the Labor Act, and the ruling of the first Railway Labor Board excluding our company is quite clear.

118

Our wages are comparable with the wages paid by other interurbans in this area of our type. During the last decade, that is, from 1926, we have reached a high point in wages. We have made reductions during the heaviest depth of the depression, and we have made increases as business revived. (138) We have had a contract with our employees. This con-

tract is peculiar to our road as compared with steam railroads but not peculiar to our road as compared with other interurban railroads of the same character. The latter have been working under generally similar labor, working conditions and scales of pay. Some have had contracts, as we have had, and some have operated without contracts. I don't know of any other electric road similar to ours that is paid the same wages and conformed to the contracts made with steam railroads by its employees. I have heard of some controversies on electric railroads that are subsidiary to steam railroad transportation systems, like the Pacific Electric, but I could not answer to the result of their negotiations.

I know of no independent electric railroad that (139) operates with very materially different labor conditions and requirements from our own and I know that the other two interurbans in Utah are almost identical with ours. Both of those used to be in receivership.

I do not know the number of the decision by the Railway Labor Board heretofore referred to by me. It might be, as a matter of fact, that the decision referred to was not a decision under the 1920 act but rather under the 1926
119 act. I think that under the 1926 act the Board never attempted to enforce the law as to interurban railroads.
(140)

(Plaintiff's counsel offered as Exhibit 29, decision of the Railway Labor Board, dated December 11, 1920, in Docket No. 26-A, involving a number of electric interurban railroads and the various railroad brotherhoods. Whereupon the Court said: "The court will take judical notice of it. You may file it for the convenience of the court," which was accordingly done.)

I have finished with my analysis of the exhibits up to and including 25.

Neither the plaintiff nor its predecessor was ever under the Federal Control Act. At the time of the Federal Control Act and its consequent proclamation we did not consider ourselves as being under federal control, by reason of the local interurban characteristics (141) of our property, and subsequently we were notifed by the government that we were not under federal control, their method of investigation being a relinquishment notice.

Paper marked exhibit 26 is a photostatic copy of a letter received by us from the office of the Director General of Railroads. (142)

Exhibt No. 27 is a chronological history of the labor agreement existing between the various crafts of employes of the Utah Idaho Central Railroad and its predecessor companies. The exhibit shows that there was an agreement in existence with Division 418 of the Amalgamated Association of Street and Electric Railway Employes of America, which is an affiliate of the American Federation of Labor, which agreement included trainmen and shop men and substation operators; that
120 the first agreement was in effect on the 25th of May, 1909, and continued by renewal and agreements, but continued without break until June 1, 1936, at which time a renewal of that agreement was not effected by reason of the complications involved in this present controversy. I have an actual copy of the latest contract, which I will attach to the aforesaid exhibit. (143) On June 1, 1936, or prior to that time, our labor relations were disturbed through organizations —efforts by organizations other than the one with which we had a contract. The net result of that disturbance being that on June 1, 1936, we entered into labor contracts expiring in 1941 with our shop, trainmen, substation operators and station employees, through their own associations as evidenced by these two contracts, and have no contract at the present time with our train service employees who have been included in this other contract since 1909. The two contracts which counsel has are the two that were subsisting on June 1, 1936, and expire in 1941.

(Said labor contracts were marked by the reporter Exhibits 27-1 and 27-2) (144)

During the existence of this company, or my connection with it, there has never been a strike or a threatened strike. These contracts have always been renewed through amicable negotiations.

Exhibit No. 28 is a condensed income statement of the property for the years 1930 to 1935, inclusive, a six-year period, and the statement shows the operating revenue, expense deductions and income deductions and indicates that for this six-year period the company has operated at a deficit ranging from $17,900 in 1935 to $68,400 in 1931. In calculating the

deficit we have charged taxes, and interest on the first
21 mortgage only. We have paid the taxes; we have not
paid all the interest on the first mortgage. (145) We
ve no second mortgage and we are two coupons or one year
ind in the interest on the first mortgage. The interest rate
six per cent. Taxes are not due for this year, but we have
oney on hand to pay it. The company has never paid in
vidends to its stockholders.

Mr. Howell: If your Honor please, in order that the record
ay be clear, I offer in evidence Plaintiff's exhibits that have
en identified and numbered 1 to 28, inclusive, including
hibits numbered 27-1 and 27-2, being the labor contracts.

Mr. Thomas: If the court please, in order to (146) preserve
ur record, on behalf of the Interstate Commerce Commission,
move that all of the evidence presented by the plaintiff, both
rbal and including these exhibits just offered, be stricken
t as incompetent and irrelevant to any issue properly before
e court.

Mr. Matheson: The defendant joins in that motion, your
onor.

The Court: The motions will be denied.

Mr. Thomas: Exception.

Mr. Matheson: Exception.

The Court: Now you renew the offer,—

And do you want that to stand as an objection to these
hibits?

Mr. Thomas: Yes, your Honor.

Mr. Matheson: Yes.

The Court: The exhibits may be received.

(Copies of said exhibits Nos. 1 to 28, inclusive, are attached
reto.)

The Witness: The plaintiff company upon reorganiza-
22 tion, after it came out of receivership in 1926, issued
20,000 shares of non par common stock and two million
llars in first mortgage bonds. These issues were reported
the Interstate Commerce Commission on annual report form
. For the period ending December 31, 1926, a report was

filed with the Commission about April 1st, on page 218, schedule 251 of which the company reported the issuance of the 20,000 shares of common stock, and in the same report on page 220, schedule 261-M the company reported the issuance of two million dollars of bonds secured by first mortgage and trust indenture. (148)

And in the same report to the Commision, in the attachment labeled "Explanatory Remarks", in explaining the institution of the new company and its acquiring of the physical properties, the company advised the Commission in the following words, quoting from this explanation:

"And in consideration of said Delaware corporation
123 issuing to the committee for the benefit of the bond holders represented by it, twenty thousand shares of capital stock of said Delaware corporation and two million dollars in first mortgage bonds of said company, secured by a mortgage and trust indenture upon certain of the property and assets of the Delaware corporation, the said committee agreed to cause said property and assets of the old company to be conveyed and transferred to the Delaware corporation, and in the order of the court confirming the sale of the said property and assets to said committee the said receiver was authorized and directed by the court, in accordance with said agreement, to transfer and convey all of the property and assets of the old company to the Utah Idaho Central Railroad Company, a Delaware corporation, which was accordingly done by an appropriate conveyance and bill of sale, and in accordance with said agreement and said order confirming sale the Utah Idaho Central issued 19,995 shares of its capital stock and two million dollars principal amount of its *forst* mortgage bonds and delivered said stock (149) and caused the trustee of said bonds to deliver said bonds to said committee for distribution among the bond holders represented by said committee."

The committee referred to in the explanation above quoted was the committee representing the bond holders of the company in receivership.

Subsequently the Interstate Commerce Commission
124 under date of February 28, 1928, (150) through M. O. Lorenz, Director of Statistics, addressed a communication to our company (152) in which he made this request as to the securities issued by the company:

"Please furnish a brief statement as to how the sale of property was consummated on November 5, 1926, and a copy of the contract of sale showing purchase price and consideration given.

"You will observe from section 3 of page 91 of the Uniform System of Accounts for Electric Railways issued under order of the Commission pursuant to law duly conferred upon it, that the investment account should be based upon the actual cost.

"In the event that consideration given in the purchase of the property is anything other than cash, the money value of the consideration at the time of the transaction should be charged to investment."

In the same letter, on the second page, he raises the following query:

"Page 219. Particulars of the issuance of the capital stock without par value were not given in schedules 251-A.

"Pages 220, 221 and 223. If the nominal date of issue of the mortgage bond does not come within the period covered by this report, should not the Returns in schedules 261-M and 261-P be cancelled?

"This change will affect the dates of the (153) schedules 200-A and 200-L also."

In said letter the Director of Statistics is referring to pages in schedules contained in the report covering issuance of the capital stock and the first mortgage bonds.

Under date of February 5, 1929, in a letter from the In-
125 terstate Commerce Commission, Bureau of Statistics, on the second page, the following paragraph reads:

"Page 223. If we are to understand from your remarks that the bonds were nominally issued as of November 21, 1926, that is the certificates were signed, sealed and placed with the trustee for delivery, that date should be shown in Column B, line 1." (154)

This refers to the same report.

Under date of March 20, 1929, in a letter addressed to Mr. M. O. Lorenz, Director of Statistics, Interstate Commerce Commission, signed by our company's auditor, on the second page the following paragraph appears:

"Page 219. To meet requirements of Schedule 251a, this will be your authority to insert data as follows:

"Column A. Class of stock, A-1.

"Column B. Date of issue, 11/21/26.

"Column C. Purpose of issue and authority.

"This stock issued as a part of plan of reorganization of new company and authorized by the bond holders of new company. The bonds held by holders of the new company were secured by mortgage and trust indenture on property and assets of said company. See schedule attached to page 100 for further explanation.

"Column D. Par value. Insert 'no par value'.

"Column E. None.

"Column F. None.

"Column G. None."

Where it said—reference is made to the explanation—it refers to the specific direction and schedule attached to page 100 (155) advising the Commission of the issuance of this stock and these bonds.

126 A letter from the Commission's Bureau of Statistics, dated April 9, 1929, signed by M. O. Lorenz, in the second paragraph reads:

"Pages 200, 202 and 203. I have noted your statements in explanation of the entries made in your accounts in connection with the acquirement of the property of the Utah Idaho Central Railroad Company at receiver's sale, and have referred same to the Bureau of Accounts for their consideration."

Following that a letter from the Commission's Bureau of Accounts, dated May 29, 1929, signed by Alexander Wiley, Director, contains the following statement in the second paragraph:

"From the explanatory remarks attached to page 100 of the report it is noted that the former company became insolvent, that a receiver was appointed on August 20, 1926, that the property was sold in two parcels at public auction by order of the court on November 5, 1926, for one and one-half million dollars and one hundred dollars respectively, to a committee of

bond holders which assumed certain indebtedness of the company and of the receiver, and that the present company organized on October 18, 1926, and entered into an agreement (156) with the committee to receive title to the property and assets, to pay the indebtedness of the old company and of the receiver assumed by the committee, and to issue to the committee first mortgage bonds in the amount of two million dollars and twenty thousand shares of capital stock which the annual report shows are without par value. The property having
127 been sold at public auction and purchased by a new organization, the continuance of the accounts of the insolvent company is not permissible. In order that due consideration may be given the transaction you are requested to furnish this Bureau with a copy of the order of the court confirming the sale of the property, also a copy of the order of the Public Utilities Commission, if an order was issued."

The last-named letter was addressed to Mr. E. L. Morris, Auditor of the Utah Idaho Central Railroad Company.

A letter addressed to J. A. Howell, Attorney at Law, from the Commission's Bureau of Accounts, dated August 17, 1929, contains the following: (157)

"It appears that the property was acquired at the receiver's sale for the sum of one and one-half million dollars and the bond holders of the predecessor company exchanged the bonds of the old company at a proportionate rate in payment of the cost of the new company and assumed certain liabilities.

"Under the classification rules this transaction should be treated as a purchase of road by the new company and accounted for as outlined in Account 527, cost of road purchased."

And again, in that letter, the following appears:

"In order that this Bureau may be fully informed as to the nature of the accounting performed in connection with the acquisition of the property referred to, will you please submit for consideration copy of the original entries recorded in the new company's books in respect thereto. With the submission
of those *entires* please explain how the money value of
128 the securities given in exchange for the properties was computed, and describe fully the nature of the assets acquired and the liabilities assumed by the company in connection with the acquirement of the property in question."

Mr. Howell, as attorney for the company, had previously written to the Commission (158) and I have in my files a copy of said letter from Mr. Howell to the Commission, attention of Alexander Wiley, dated December 19, 1929. Said letter reads:

"The Utah Idaho Central Railroad Company, a Delaware corporation, which although for business (159) reasons kept substantially the same name, was nevertheless a distinct and separate company from the old company, and purchased the properties from the committee which had purchased them at the receiver's sale, not for the same consideration as paid for by the committee at the sale, namely, the sum of one million and a half dollars, but for the issuance to the committee of bonds of the new company in the principal amount of two million dollars, and twenty thousand shares of the common stock of the new company, of which 19,995 shares have been issued.

"In other words, the Utah Idaho Central Railroad Company purchased this property not for the sum of one and one-half million dollars, but for the bonds and stock of the company as above specified.

"I am enclosing you a copy of the agreement between the Utah Idaho Central Railroad Company, a Delaware corporation, and the committee of bond holders who were purchasers at the receiver's sale.

"You will observe from that contract that the considera-
129 tion for the properties was two million dollars in first mortgage bonds of the company and twenty thousand shares of capital stock of the company."

A letter from the Commission's Bureau of Accounts, dated April 7, 1930, to E. L. Morris, Auditor of our company, reads in part as follows: (160)

"Your annual report for the period November 21, 1926, to December 31, 1926, shows in explanatory remarks attached to page 101 that the new company issued securities in the amount of two million dollars and took over all of the physical properties and other assets of the old company, and assumed its liabilities.

"Under the Commission's rules this transaction should be treated as a purchase of road by the new company and accounted for as outlined in account 527, cost of road purchased."

A letter signed Alexander Wiley, Director, addressed to me as General Manager of the plaintiff company, dated December 26, 1930, reads in part:

"From your letter it is now understood that the accounts of the new company did not in fact include adjustments which should have been made on the books of the predecessor company, but that the credit to profit and loss of $728,154.84 represents a portion of the 3,499,995 assigned (?) as the total (161) money value of the non par stock issued as part consideration of the properties acquired. With the definite understanding that the values assigned to the railway properties and the other assets acquired and the liabilities assumed as set forth on page 2 of your letter represents actual money
130 costs and further that your company is responsible for the accuracy thereof, this Bureau authorizes their audit in the sums indicated, with the provision that the sum of $728,145 shall be cleared from Profit and Loss to Account 423, Capital Stock.

"As soon as possible please furnish this Bureau with the proposed plan of distributing the cost of property to the appropriate primary investment accounts. Also submit a copy of the adjusted entry eliminating the sum of $728,145 from Profit and Loss."

(Whereupon plaintiff offered in evidence the portions of each of the above-named letters which had been read into the record and the same were admitted by the court.) (164)

P. H. Mulcahy, continuing.

The plaintiff company never asked permission or certifi-
131 cate from the Interstate Commerce Commission under the provisions of Sec. 20(a) of the Transportation Act for the issuance of the securities above named. The Commission has never made any complaint about the issuance of these securities without permission. (165)

The two pamphlets just marked for identification plaintiffs' Exhibits 30 and 31, are respectively the accounting regulations of the Interstate Commerce Commission under which electric and steam railroads keep their accounts, and Ex. 31 applying to the accounts kept by electric railroads is a copy of the regulations under which the plaintiff company makes its reports. The title page of Ex. 30 is "Uniform system of Accounts for

Steam Railroads Accounting Classifications * * * Interstate Commerce Commission in Accordance with Section 20 of the Act to Regulate Commerce, Revised to January 1, 1916." (169) The title page of Ex. 31 is as follows: "Uniform System of Accounts for Electric Railway Prescribed by Interstate Commerce Commission in accordance with Section 20 of the Act to Regulate Commerce, Issue of 1914." (The Court admitted said exhibits in evidence and stated that it would take judicial notice of the regulations.)

Prior to becoming a business manager for the plaintiff company I was its auditor, and for some years prior to becoming general manager I followed the vocation of auditor with the Southern Pacific Railroad (170) and subsequently with the plaintiff company. I am able to state the essential differences in the manner of accounting of electric railroads and steam railroads as prescribed by the regulations of the Interstate Commerce Commission. The steam railroad classification 132 and accounting requirements are substantially in greater detail than those of the electric classification. Likewise, the steam railroad classification takes into consideration, as compared with the electric classification, the distinct or different type of the two carriers. To illustrate: in one part of the electric railway classification both debits and credits for hired equipment—in other words, the amount that the carrier might receive for the use of its equipment on other carriers' lines, and the amount it might pay to other carriers for the use of their equipment, is considered in the electric classification as operating revenue and operating expense, while the same character of expense on a steam railroad is not considered in the operating revenue or expense accounts at all, but rather an income credit or an income debit, apparently on the theory that—

("Mr. Thomas. We object to this. The Commission's regulations speak for themselves. Why they were made is something only the Commission could say.

Mr. Howell. I submit as an auditor, and therefore an expert, I have a right to have his opinion as to why the difference. (171)

The Court. The objection will be overruled.")

(The witness resuming) This is apparently on the theory that small interurban railroads are not large owners of freight

equipment, do not own anywheres near their relative proportion of freight equipment to freight mileage, and that it is a common and usual practice for small interurban lines to receive their freight car equipment from their trunk line con-
133 nection; while, on the other hand, the investment or trunk line steam railroads in freight equipment is substantial and it is higher; or to other roads is in the nature of an income on substantial investment rather than merely an operating cost or an operating income. The same general distinction applies to joint facility debits and credits. In the electric classification rental payments and receipts, both debits and credits, and joint facilities, are included in operating expense and operating revenues, while in the steam classification they are included as income debits and income credits. Further, in the steam classification of power costs, that is, fuel costs and costs for propulsion power, are included as a transportation item in the general heading "Costs of Conducting Transportation"; the maintenance of any facilities used to develop or supply those power requirements is included in way and structure maintenance, while in the electric classification the entire power costs, including the price of electricity, the operating cost of the power stations (172) and the maintenance of the buildings and machinery in those stations, are set up in one general power account. Throughout the classifications, there are minor differences, that is, relatively minor differences, leading to a much enlarged and more detailed requirement from steam lines than from electric railways. There is likewise in the steam railroad classification a provision that while electrified portions of steam railroads may be accounted for for the carriers' information in the sub-accounts of the electric classification, in the report to the Commission they shall be reported under the steam classification. I have detailed the most prominent differences. (Plaintiff's counsel thereupon presented a copy of the articles of incorporation of the plaintiff company, which were marked for identification as plaintiff's Ex. No. 32.) and the same were received in evidence. (173)

(Witness resuming) The plaintiff company does not
134 own any steam power equipment at all, and no steam power is used in the operation of the railroad. The plaintiff company has never received any advance or moneys from the United States under the Federal Control Act or under the Transportation Act, or any other act of Congress. I have here copies of the contracts with our employees that were in

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force prior to the contracts which have been introduced in evidence. (174) (Certain contracts marked plaintiff's Ex. 27-3, and being offered in evidence were admitted by the Court.)

"Mr. Howell. Q. I wish you would detail how the differences between this contract which was in force prior to the contracts that were introduced in evidence this morning, came about.

Mr. Matheson. If your Honor please, we believe that to be wholly immaterial and therefore object to the question * * *.

The Court. Objection will be overruled. You may have an exception." (175)

(The witness resuming) As indicated in Ex. 27, we have had continuous contractual relationships with our employees, and prior to June 30, 1936, we were operating under a contract between the company and Division 418 of the Amalgamated Association of Street and Electric Railway Employes and Coach Operators of America.

This is a member union of the American Federation of Labor, and is the labor organization that for many years has handled labor relations on street and interurban railways.

With the attempted imposition of the Railway Labor
135 Act on our property and the interference from the so-called Steam Railroad Brotherhood, the Brotherhood of Railway Trainmen, the situation developed where it was impossible to continue this contract with the electrical railway brotherhood, and as a result of the disturbance created prior to June 30, 1936, the net result was that a substantial portion of the employees covered by the Amalgamated contract associated themselves together into their own organizations and entered into contracts with the company running until June 1, 1941. Those are the contracts that were offered this morning as 27-1 and 27-2, (176) our labor situation now being that all of the shop employees and station employees are operating under proper labor agreements, and that out of a total of one hundred and forty to one hundred and fifty employees there are between twenty-five and thirty that were on this original contract that are now endeavoring to proceed under the Brotherhood of Railway Trainmen. (177)

Prior to the time I have mentioned I dealt with a unit of the American Federation of Labor. We were unable to con-

tinue to deal with that unit because the claimed uncertainty of our position in the Railway Labor Act put us in a position that if we were under that Act, we were not permitted even to discuss the propriety of the attempt of a very small part of the employees to impose on this railroad this standard Steam Brotherhood, and we reached the impasse where the company, until their status was clarified, could take no action, and as I recount it, all the employees from stations and shop, mechanical and electrical departments, voluntarily, themselves, associated in their own organization and left the situation with twenty-five employees who formerly enjoyed a contract, without a contract. The action taken by those employees who became parties to this new contract was entirely voluntary upon their part and without any influence or discussion on the part of the company. (177)

136 The first attempt on the part of one of the standard Steam Railroad Brotherhoods was December 1, 1933, in the form of a letter of that date. (Said letter marked for identification plaintiff's Ex. No. 33, said letter being addressed to "P. H. Mulcahy, General Manager, U.I.C. R.R. Co., from C. H. Tanner, Deputy President, Brotherhood of Railway Trainmen, dated December 1, 1933. Plaintiff's counsel offered said Ex. No. 33 in evidence.)

Mr. Matheson. We object to it, your Honor, as being wholly immaterial, between parties not involved in this suit.

The Court. Do you claim anything for it?

Mr. Howell. Yes, I do, if your Honor please.

The Court. Then I will overrule the objection. (178)

(The witness resuming) Upon receipt of said letter I replied to it and have here copy of said reply. (Said copy marked plaintiff's Ex. 34, being dated December 12, 1933, addressed to Mr. C. H. Tanner, Deputy President, Brotherhood of Railway Trainmen, and signed by the witness, being offered in evidence it was admitted by the Court.) (179) Subsequently I received a communication from Mr. Tanner, Deputy President of Brotherhood of Railway Trainmen, (180) and here present said reply. (Marked plaintiff's Ex. No. 35. Offered in evidence.)

"The Court. You make the same objection.

Mr. Matheson. Yes, I do, your Honor.

The Court. Same ruling."

I subsequently replied to that letter, and I here present
137 a copy of my reply. (Said paper marked plaintiff's Ex. 36. Offered in evidence by plaintiff and objected to by Mr. Matheson. The same was admitted in evidence by the Court and exception allowed.) (181)

I subsequently received another letter in relation to this matter from the Brotherhood of Railway Trainmen, and here present letter dated January 8, 1934, addressed to me, signed W. H. Smith, Chairman, W. A. Stone, Vice Chairman, and W. Jessup, Secretary, on the stationery of the Brotherhood of Railway Trainmen. (Offered in evidence by plaintiff's attorney. The Court over the same objection by Mr. Matheson admitted the said Ex. 37 in evidence.) (182)

I replied to said letter, and here present copy of my reply dated January 17, 1934, addressed to Mr. W. H. Smith, and the other persons who signed the letter previously referred to. (Offered in evidence by the Court, objected to by Mr. Matheson, it was admitted in evidence by the Court.)

Subsequently I received another letter from the same gentlemen dated April 13, 1934 (which letter was marked for identification Ex. 39, offered in evidence, same objected to by Mr. Matheson, admitted by the Court.) (183)

Attached to the letter which has been admitted as Ex. 33 was a proposed agreement between our company and the Brotherhood of Railway Trainmen. The document which has been marked for identification plaintiff's Ex. 40 is said agreement, with the exception that the pencil notations now appearing thereon were not there when I received it. Those pencil notations are merely our present rates of pay and were made by me to compare the proposal with our present agreement. (Offered in evidence by plaintiff's counsel, same objection by Mr. Matheson; said Exhibit 40 was admitted in evidence by the Court.) (184)

The agreement submitted in Ex. 40 was never consum-
138 mated. Subsequently I had a conference with representatives of the Brotherhood of Railway Trainmen. It was on July 2, 1936, in my office in Ogden. Present were D. Mackenzie, Vice President of the Brotherhood of Railway Trainmen, Mr. Beckett, of Ogden, Vice Chairman of said organization of

the Oregon Short Line, and Mr. Rampton, of Ogden, a conductor of our company. I was present and Miss Keating was the reporter that took the transcript of the conference; what was said there was taken down in shorthand and afterwards *transcribed.*

(Mr. Matheson. We object to that as being wholly immaterial. Cannot see it has any bearing upon the subject.

The Court. What do you claim for it? (195)

Mr. Howell. I claim this, if your Honor please, this is carrying out the previous demand of the Railroad Brotherhood for action under the Railroad Labor Act. I will show by this that this conference was had specifically under the Railway Labor Act and will tend to show, as we think, what we have alleged in our complaint and what has been denied by the answer, namely, the threats of prosecution under the Railroad Labor Act if we should refuse to comply with it.

Mr. Matheson: Do you claim an official body assembled there?

Mr. Howell. Oh, yes.

Mr. Matheson: Under the provisions of the Act?

Mr. Howell. Oh, no, I don't claim this was that; I claim these were the negotiations which would have, if we had acquiesced in them, led to—

Mr. Matheson. We submit that is wholly immaterial.

The Court: You will admit you would have prosecuted them if they had not brought this suit, and will do it still
139 unless the court enjoins you? That would go to the jurisdiction of the court, invoking the jurisdiction of the court to enjoin you. You might say you never had any intention of—

Mr. Matheson: We contend, though, your Honor, the prosecution is only upon the authority of the Attorney General. We could not say without that instruction that we would prosecute even a violation.

The Court: I suppose the purpose is to show you (186) really considered you were in some danger or you would not have brought this lawsuit, is that the idea?

Mr. Howell. Yes.

Mr. Cass. May I direct attention, if your Honor please, to section 2—10th of the Railway Labor Act, which seems to require the district attorney upon request of the designated representative of labor to start prosecution.

It reads this way:

"It shall be the duty of any district attorney of the United States to whom any duly designated representative of the carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for enforcement of the provisions of this section."

It seems to me that ties into the question directly of what these labor men were doing in their negotiations with this property.

The Court. You do not feel inclined to admit that Mr. Shields did intend to prosecute and would do it yet if the court doesn't stop him?

Mr. Matheson. It appears, your Honor, the plaintiff wishes it to be shown they have violated the Act.

The Court. That would be your position, of course,—
140 that is your position now, but if you are not willing to admit that, then they can lay such ground work as they can to show they were in danger of being prosecuted under the Act. (187)

Mr. Matheson: We could not admit they were in danger, your Honor.

The Court. You can admit that?

Mr. Matheson. We can not. In the first place, the Act specifically requires the authorization of the Attorney General.

The Court. Then I will let you take this proof for the purpose of showing you were in jeopardy, more or less, or supposed you were.

Q. (By Mr. Howell) Now, do you recollect the question, Mr. Mulcahy?

A No, I do not.

The Court. You asked him what the interview was.

Mr. Howell. The only reason I thought it would be better to have the question read was that it would avoid the necessity of another objection.

(Witness resuming) At the opening of the conference I said to the gentlemen, "Will each of your gentlemen tell me who you are and whom you represent?"

Mr. Mackenzie replied, "I am D. A. Mackenzie, am vice-president of the Brotherhood of Railway Trainmen. My temporary address is Salt Lake City, care of the Hotel Utah.

"Mr. Beckett, here, is acting just as my chauffeur, and is not here is any official capacity." (188)

I said, "Mr. Beckett, will you give me your address?"

"I live at 812 Twenty-eight Street, Ogden, and am vice-chairman of the Oregon Short Line Brotherhood of Railway Trainmen."

Mr. Mackenzie. "The majority of your train service
141 employees have affiliated themselves with our organization and have requested that we represent them, and it is usually customary to call on an official representing the company and arrange for a conference."

I said, "You say 'majority'. How many do you mean?"

Mr. Beckett replied, "About eighty-five per cent."

I asked, "How many men do you represent?"

Mr. Beckett replied, "I would say twenty-five or thirty train service men. I have a list of them."

I requested that he file a copy of the list with me.

"Mr. Rampton, our secretary of the lodge No. 68, has a list and we could give you a copy."

I requested that it be sent up to me.

I then asked Mr. Mackenzie, "What class of employees do you represent?"

His reply, "Motormen, conductors and brakemen."

I asked, "How about motor coach operators?"

He replied, "What are their duties?"

I said, "Coach operators who operate on main line coaches."

He said, "If they are operating out of the city, yes. I am not very familiar with that phase of it." (189)

I asked, "Do you represent motor coach operators who have interchangeable rights?"

His reply, "Yes."

I asked, "How many of these twenty-five or thirty men are members of the Brotherhood of Railway Trainmen?"

Mr. Beckett replied, "I would say there are about twenty-three or twenty-five of these men in the Brotherhood now."

I asked, "You will give me that actual information?"

His reply, "Yes."

I asked, "Does the Brotherhood of Railway Trainmen permit the joining of motor coach operators?"

Mr. Mackenzie replied, "Yes."

I asked, "Where they do not have interchangeable rights?"

His reply, "Yes."

142 I asked, "You have amended your Articles recently, then?"

His reply, "Yes. Our laws permit our president to interpret the eligibility, and it has been interpreted by Mr. Whitney that such men are eligible."

I asked, "As to those twenty-three or twenty-five men, are they full-fledged members, or are they members who are being tentatively taken in at a much reduced initiation and limited dues pending what the Brotherhood does?"

Mr. Mackenzie: "They are taken in as bona fide members, subject to the same dues and assessments. We have (190) only one class of membership."

I asked, "These twenty-three or twenty-five men that you refer to as members, do they understand they are subject to full dues, and so forth, of the Brotherhood of Railway Trainmen?"

Mackenzie replied, "Yes."

I asked Mr. Rampton his position in the conference.

He replied, "I am chairman of the Utah Idaho Central Committee representing employees."

My question, "Who are the balance of the Committee?"

His reply, "W. A. Stone, vice-president, J. T. Watson, additional member."

Mr. Mackenzie then said, "You understand, Mr. Mulcahy, that it is not necessary for them to be members of the Brotherhood of Railway Trainmen under the law."

I asked, "Under what law?"

His reply, "The Railway Labor Act."

I then said, "I assume you are familiar, Mr. Mackenzie, with the fact that the Utah Idaho Central has pending in the Federal Court of the District of Utah a complaint and request for an injunction against the United States District Attorney asking that the court restrain that agency of the government from enforcing the Railway Labor Act on this company?"

Mr. Mackenzie replied, "I was present at the hearing held
143 last Saturday, and I spoke to Matheson, Assistant District Attorney, and told him that I understood there were two (191-) phases at issue in the court, one restraining the Internal Revenue Collector under the Railroad Retirement Act, and the other case had reference to the Railway Labor Act, and I called his attention to the fact that we propose to open negotiations in connection with the Brotherhood of Railroad Trainmen, and he advised me that he placed no restrictions on our doing so."

I then said, "For the purpose of an understanding, I would like you to verify this,—the action was brought on behalf of the Utah Idaho Central Railroad to restrain the United States District Attorney from imposing any penalties under the Railway Labor Act upon the complaint of this company alleging that we are not subject to the Act. The action brought on behalf of the company asked for a temporary restraining order. The government through Mr. Matheson asked for a postponement of the hearing."

Mr. Mackenzie then said, "I didn't see you there."

I continued, "I was present for a while. We were represented by Judge Howell, who raised the question with Judge Johnson that we were ready for trial but the government was not. Judge Johnson granted an extension of the case until the 21st of August and stated that he did not expect the government to take any steps in the meantime to impose any penalties of the Act.

"My opinion is that the negotiations which you have requested to initiate are closely tied up with the mandatory provisions of the Railway Labor Act, namely, outside representation, (192) mediation, adjustment and so forth. Those are the features of the Railway Labor Act which prescribe a penalty. In fact, they are the only mandatory features of the Act.

"It seems to me that in view of the pending court action,
144 or until the trial of that case on the 21st of August, Mr. Mackenzie, nothing can be done until we have a clear understanding."

Mr. Mackenzie replied, "You are declining to meet with us, then?"

My reply, "In view of the fact that you have based your conference on the right of representation granted by the Railway Labor Act, and in view of the fact that the district judge of the federal court has ordered that there shall be no effort made to impose the Act on our properties until the hearing of this case in his court, you should not request us to meet prior to that date.

"In other words, if the court holds that we are subject to the Act, certainly the path is pretty well charted, should we be unable to agree.

"On the other hand, if the court holds we are not subject to the Act, it will definitely determine our policy whether or not to negotiate with you. I think that is a fair proposition."

Mr. Mackenzie replied, "There is not any restrictions or penalties. I was up to the Capitol with Mr. Laiserson on some other matters, and you are making money. Your statements show (193) an increase in your net income."

Q. (By Mr. Howell:) Do you know who Mr. Laiserson is?

A. He is chairman of the Railway Board of Mediation.

I then asked Mr. Mackenzie how long he was to be in town, and he replied that he was working on the Orem line and would be there for a short time.

I then told Mr. Mackenzie I would mail a copy of this statement to him tomorrow, and suggested that "You go and talk to Mr. Matheson and show him our position in the matter. If there is any misunderstanding in the matter, suggest you advise me, and I will have Judge Howell, our attorney, 145 confer with both you and Mr. Matheson as to the statement of the court, and if necessary the three of you gentlemen go to the judge direct."

I mailed a copy of this transcript to Mr. Mackenzie at the Hotel Utah, according to my promise, and on July 8th received from Mr. Mackenzie the following letter —

Mr. Matheson. If the court please, we move to strike the testimony with respect to the conference referred to by the witness because of its immateriality.

The Court. The motion is denied.

(Plaintiff's Exhibit No. 41 was thereupon marked by the reporter.)

(Witness resuming) Subsequently I received a letter from Mr. Mackenzie after sending him a copy of the transcript I have just read (194) and said letter has been marked for identification plaintiff's Ex. 41. (Offered in evidence by plaintiff's attorney, same objection by Mr. Mackenzie, said Ex. 41 was by the Court admitted in evidence.)

(Witness resuming) I have made an estimate of the amount of the additional payments that would be required under the proposed contract which was submitted together with Ex. 33 and which contract has been introduced in evidence here as Ex. 40, and additional expense to the company through the adoption of the contract would be from thirty-five to forty thousand dollars per year. (195)

Mr. Matheson. Your Honor, we move to strike the answer of the witness as being wholly speculative and not officially a determination of any Board or Bureau of the Interstate Commerce Commission or the Labor Board.

The Court. It seeks to relate to proposed contract—I suppose by its terms it would require these additional payments as he calculated them.

Mr. Howell. Yes.

146 The Court. If any point about it, I would require you to have him state how that came about.

Mr. Matheson. We don't know of any basis for his conclusion.

The Court. Might take the contract, there, and tell us about it.

With that understanding, that he shows how he arrived at it, it may stand at present.

Mr. Matheson. Probably as a matter of his own opinion what might happen.

The Court. I don't know whether it is his own opinion or not. Maybe it shows on its face something.

Mr. Howell. It shows the rates, and all that, to be applied to the employees.

The Court. If the contract is any good for anybody it ought to state terms capable of interpretation.

Mr. Thomas. But that contract, your Honor, that demand is under the terms of the Labor Act, subject to consideration (196) by the Mediation Board and the Adjustment Board, in order to be enforced on this carrier it would have to be approved by them, so in estimating what the additional expense would be they are assuming those Boards organized under the Labor Act would approve of that, something which I submit they can not do at this time. When and if such a contract is approved—

The Court. He has got to convince this court—He is not coming here asking this court to adjudicate something that did not involve anything of any value. If you will admit it was something of substantial value that would be an increase, I wouldn't care about the detail of it, but at least they do not invoke an equity court's powers over a triviality.

Mr. Howell. That is the purpose.

Mr. Thomas. Admittedly it would have to admit if the
147 contract were put into effect it would increase considerably the expense. The point is, before that can be done

or expense entailed on them, it would require the approval of two boards—at least one of two boards.

When and if the Labor Board makes the requirement that they pay these increases, then and not until then have they a right to come to a court of equity and ask relief from an order of the Board. (Discussion) (197)

The Court. In any event, I will overrule the objection. (199)

(Witness resumi) I arrived at the above stated estimate of the increased expense to the company by applying the contract rate on the first eight hours of passenger motorman calls for a rate of pay (199) of 56 cents per hour against our present sliding scale of thirty-nine and a half to forty-six and a half cents, the maximum increase there being sixteen and a half cents an hour, or in excess of forty per cent.

On freight motormen it calls for an increase from fifty-one to sixty cents, or an increase of nine cents per hour.

On passenger conductors the maximum increase requested in the first eight hours is sixteen and a half cents an hour.

On freight conductors, nine cents an hour.

On brakemen and trolleymen, six and a half cents an hour.

On main line motor coach operators, fifteen and a half cents an hour.

On Logan City coach operators, eight and a half cents an hour.

Now, that is for the first eight hours' pay. If the time of their run exceeds eight hours, their maximum increase in the case of passenger motormen is forty-four and a half cents per hour, or an increase of approximately one hundred and five per cent.

In the case of freight motormen, thirty-nine cents an hour, or an increase of approximately eighty per cent.

The increase in the other classifications of passenger
148 conductors, freight conductors, brakemen, trolleymen and coach operators for all labor in excess of eight hours,
(200) amounts to from eighty to one hundred per cent increase per hour.

The contract required that all work in excess of eight hours be paid at these extremely high increases; that eight hours be guaranteed as a day's pay, whether worked or not.

The practical application of a clause of that character on an interurban railroad would prohibit certain types of its operation whereby men are sent on short trips to haul in one car of provisions or one car of milk, because the guarantee of eight hours' pay for, say, two hours' work, would run to either an exorbitant cost or prohibitive situation. We would be faced with the proposition of standing exorbitant expense or being required to retire from certain types of business that is essentially interurban.

Another clause in the contract is that a regularly assigned man, after completing his regular assignment, is called for other work, would be paid time and one-half with a guarantee of not less than four hours.

Now, the operation of that clause in the contract would be practically this,—a train man called in Preston, Idaho, our northern terminus, to bring a passenger train to Ogden, Utah, would consume three hours' actual running time. We would be required under the contract to pay him for an eight-hour day. After he arrived in Ogden and we find it necessary to send him to Plain City, a point about ten or twelve miles above here, for a car of potatoes, we would (201) have been required to pay
him the eight-hour day minimum first from the run from
149 Preston to Ogden, then we consume forty-five minutes sending him to Plain City after he has worked three hours, and we will be required to pay him time and a half for not less than four hours, or in other words, time and a half at the rate of eighty-four or ninety cents per hour.

There is another clause in the contract that requires that trainmen called within four hours after the completion of a previous run will receive straight time.

That means that a man brings a train into Ogden, if he is called any time four hours after he is relieved from duty, he is paid the entire four hours during which he had been relieved.

And it further provides if he is called after four hours from the completion of his run he will be paid eight hours, irrespective of the time worked, and that so-called regular men called to do extra trips other than their regular run will be paid not less than eight hours, an illustration of that clause being that a regular crew leave Ogden at one-thirty, arrive at Preston Four-forty-five, leave Preston at five-ten and arrive at Ogden

at eight-twenty, which is one of our present schedules, and the man is actually at work seven hours and fifteen minutes, he will first be paid eight hours for that work and if we ask that man to go to Brigham City and back, which would take approximately two hours more, he would be paid another eight hours for that two hours. (202)

In addition to the overtime rate which is shown in the contract and which is one and one-half times the regular rate, section 8 provides that for the ninth and tenth hour this shall be one-eighth the daily rate, and after ten hours three-sixteenths of the daily rate,—or another multiple of fifty per cent is added.

Section 11 requires that not less than three men shall be
150 on any passenger train. Our present passenger trains consist of one car. We operate them with two men, many railroads with one man. This contract provides we shall not send out a one-car passenger train with less than three men.

Section 12 requires that we shall not send out a freight train with two cars unless we have four men on the crew.

Many of our trains, such as milk service, a somewhat peculiarly distinct interurban service, is operated on our property and by other interurbans with two men.

Section 15 requires that we may not use a crew in operating switching work without at least four men.

Section 18 provides that any employee censured or dismissed shall have the right to be represented by an outsider, and goes into some detail as to the stenographic records to be kept and necessitates that all witnesses be heard at the same time and all be present at the same time.

That is somewhat unique in the relations between an employer and employee. (203)

Section 33 provides when two or more classes of service are performed in any one day the rate for the highest class shall be paid for the entire day.

For instance, if a brakeman who is a qualified conductor works as a brakeman for seven hours, and then for one hour is used as a conductor on extra work, he will be paid for his entire day at the higher rate, or at the rate of a conductor,

notwithstanding that seven-eights of his service and responsibility was given the company as a brakeman, or at a lower rate of pay.

Section 34 provides that notwithstanding the penalty for overtime after eight hours, crews may not be tied up until after fourteen hours unless they have reached their home terminal.

Section 36 provides that trainmen will not handle train orders at any agency station.

That is in view of the fact that the entire operation of
151 this property is based upon a direct transmission of train orders to conductors, and such a rule would require this railroad company to hire qualified train order operators at every station along our railroad and make a complete change in our agency stations.

The normal method of operating by train order or an interurban electric railroad is that the conductor in charge of the station contact the dispatcher directly by telephone. The order is given to the conductor by phone, who copies it down in the prescribed form and repeats the same back to the dispatcher. (204)

Now, this rule would require the company to employ a third party in that transaction who would be subject to the Commission's regulations as to railroad telegraphers, hours of service, and so forth, who would listen to the dispatcher and copy the order down for the conductor, and then take the order which he has copied down and hand it to the conductor, who would read it back to him to see if it was correct.

In speaking above of the conductor of the station I meant conductor of the train at the station.

It provides that the company guarantee that during the term of its contract not less than eighty per cent of the men actually employed will be members of the Brotherhood of Railway Trainmen, and that the company guarantees that this (205) percentage will be maintained at all times.

In other words, if this contract be entered into tomorrow, and twenty-two per cent of our older employees did not see fit to join the Brotherhood of Railway Trainmen, the burden would

be placed upon me to take those twenty-two and pick
152 out two that I would discharge for no other reason than to keep up the percentage of employees who are members of the Brotherhood of Railway Trainmen.

I do not quite understand that clause. As the contract was offered pursuant to the Railway Labor Act, it apparently asked us to agree to violate it.

I have recounted the major and important additional burdens and requirements of this contract if imposed on our property. This is the contract, the offering of which influenced us to seek court protection against the burdens of the Railway Labor Act.

Mr. Matheson. I move to strike the testimony of the witness with respect to the proposed contract because it is immaterial and it is apparant that plaintiff has come to this court rather than to the Adjustment Board, a matter which is specifically provided for in the statute. Furthermore, it is only a demand, and therefore not binding in its present form, and therefore would be immaterial at this time.

The Court. The motion will be denied.

(Witness resuming) By taking the terms of this contract and applying it to the number of men we have employed in the train service is the method by which I arrived at the estimate that it would cost an additional $35,000 a year. (206)

This contract would apply to 28 employees out of an
153 average of 141. We estimate the burdens of this contract would increase our labor cost from $35,000 to $40,000 a year. As a railroad operator I can only assume that if we are forced into a position whereby 28 out of 141 employees can threaten an increase in operating expenses of that much, that if the matter spreads to the other 141, we stop railroading.

The Court: Let me interrupt you. You mean to say, then, that sort of contract would be unfair and impractical if applied to your railroad?

The witness: It would be unfair and impractical, and in addition to that, your honor, if applied would have produced an increase in the labor bill that would prohibit us from continuing in existence.

The Court: Would it be unfair—or is it unfair when applied to steam railroads that operate trains for comparatively long distances, big trains as compared with yours?

The Witness: As to whether it is unfair or not, I have some very definite opinions on that. But it is the type of labor contract and labor penalties that is in effect today on the steam railroads. (207)

The Court: I mean by that whether or not taking into consideration the amount of work they do, the manner they do it, and your income and all that sort of thing, whether as a practical proposition the company could pay it, whether they would earn the money or not.

The Witness: As far as our property is concerned, absolutely not.

The Court: Suppose you apply that same sort of con-
154 tract to the Southern Pacific Company, that operates with a crew from Ogden to Winnemucca?

The Witness: The Southern Pacific are working under contracts with such penalties and restriction in, have been for some years.

The Court: Does it give occasion for one man to get two salaries in one day, as you suggested it would for a man working then you send him out to Plain City?

The Witness: The present contract in effect on the steam railroads have just such penalties in them. I assume the reason the steam railroads are able to take that burden is because of the size of the trains and the amount of revenue that is produced to them from a single operation.

But when you attempt to impose those penalties on a type of operation that has short trains, sometimes one car, two cars, with an average of eight or nine cars in all their trains, and with men whose normal day's work is entirely distinct from the work on a steam road—they haven't the responsibility of a train of from two to six or eight or ten cars; the conductor on a steam railroad has the responsibility of a train from 75 to 125 cars.

The freight and passenger division on these long transcontinental lines are so spaced as to distance that it is a day's work for a passenger crew to go from one terminal to the other

passenger terminal, or their freight crew to go from one terminal to the other terminal.

On our railroad we have got to run them back and forth
155 all around, a couple or three times, in order to get a day's work for them. It takes us by passenger train slightly under three hours to run from Ogden to Preston. (209) We work our men a round trip from Ogden to Preston and back in a day, a day's work except in instances where we operate school service on the Plain City branch, when the employee will make that trip either before or after his main line trip. The steam railroads endeavor to space their division points so that one run fits as closely as possible with their labor contracts. They have hundreds of miles of railroad in order to make that spacing. I do not know the result of the steam railroads in the matter of penalties. I do know that the question of penalties to be of tremendous moment to us. There is a substantial difference in the method of operation and in the application of such a contract to the two situations because the steam railroad has large mileage and large trains and can adjust their operation to their labor contracts. (210)

I might put it another way. The present form of penalty labor contracts has developed on the steam railroads of the United States as those railroads have developed, and no effort has ever been made to impose that type of contract upon interurban lines for the reason that they are distinctly different, they operate differently, and the requirements of their employment are different, and what is happening in this contract is an attempt to impose upon an interurban railroad labor conditions that have developed on steam railroads simultaneously with the development of those roads, and obviously the contract is impractical as to the size of our road and as to the method of our operation.

As I mention in one of these paragraphs, it would abso-
156 lutely force us out of the distinctly interurban type of business, of taking a locomotive or power unit and going out eight miles and picking up one car or two or three cars of freight, perishable freight, and bringing it in for a specific connection. It would eliminate such type of service.

It is very common to start a carload of eggs destined to the eastern market at Preston and stop the car at Logan while the same shipper adds another 100 cases and stop at Brigham and add some more, and bring it into Ogden.

You cannot furnish that type of intensive interurban service under such restrictive contracts as this. So there has developed on interurban railroads the policy of paying the men per hour for the time they work. In other words, we pay them for what they do, not for what they should have been doing. We have some crews that tie up away from their home terminal, but the size of our road brings our men home at night a very much larger percentage than on the large roads. On steam railroads practically all of them are required to maintain two homes. This is not the case on our road.

Plaintiff's Exhibit No. 42 marked for identification is a passenger time table of our railroad in force at the present time. As I have already explained there are no time tables for our freight trains; they are operated on orders. (212)

I received directions from the National Mediation Board containing the prescribed form of notice as set out in Section 2, eighth paragraph of the Labor Act and ordering us to post it. I did not comply with the order. The order was a circular addressed to all carriers subject to the Railway Labor Act and was mailed to the Utah-Idaho Central Railroad Company.

The gross operating revenue of our company for the year
157 1935 was slightly in excess of $514,000; of that amount $403,000 was freight revenue and $64,400 was passenger revenue, the balance being minor items such as express, per diem revenues, joint facility, rates, etc. As to the sources of our freight revenue, we get revenue from local people who ship locally, also from freight that is shipped in, like coal cars that are shipped in from southern Utah. (215) We have a tabulation of freight from the outside by taking a specific period with statement of carloads. Comparing our revenue for 1935 with the average revenue for the 20-year period of our operations, gross revenue 1935 was $514,000; our average gross revenue over the 20-years was $697,000, showing a decrease in 1935 of $183,000 from the 20-year average, 1916 to 1935. The period includes years of depression, up to and including last year. (216)

Now, the average revenue for passenger operation for the 20-year period was two hundred and forty-six thousand dollars.

The average passenger revenue for the twenty-year period was two hundred and seventeen thousand dollars.

The total for 1935 was sixty-four thousand dollars.

The average revenue from freight operations for the twenty year period was four hundred and four thousand dollars.

The 1935 total was four hundred and three thousand dollars, illustrating, that the freight operations of the company have produced a revenue within a thousand dollars of the average freight revenue during its entire life, or that there has been no particular change in the type of freight operation or the revenues produced from it, whereas the passenger revenue has reduced in 1935 by one hundred and fifty-three thousand dollars as against a twenty-year average, or that reduction in passenger revenue accounting for practically all of the reduction in the gross revenue compared with the twenty-year average.

158 This situation developing from the fact that the only change in the character of railroading from the time it was constructed as an interurban has not been a change of character, but a change, or a loss in revenue, due to the increased number of automobiles and the construction of hard-surface roads which has taken away from it its passenger earnings, but it still continues to do the same character of interurban freight operation for which it was originally constructed. It is only the fact of reduction in passenger revenue that has made any change in the relative proportion. There has been a reduction in the number of our passenger trains. Originally we operated a passenger train out of Ogden every two hours. They are now reduced to 8 trains and buses each way a day. In Cache Valley there is local service furnished and the reduction has not been quite as sharp, but on the whole there has been a substantial reduction in the number of passenger trains operated by reason of hard-surface highways and the increase of public ownership of automobiles.

I have made an analysis by carloads of the freight business handled by the railroads during the last 6 months period of the year 1935. (218) That is a representative period in the operations of the company. The received carloads for the 6 months period from July 1 to December 31, 1935 totalled 4,673 cars, of which 3,843 cars or 82.2 percent originated within the State of Utah and terminated at some point on our line. 830 cars or only 17.8 percent originated in states outside the State of Utah. The 4,673 cars, classified as to commodities carried show 1,476 cars carried raw materials to the processing plants located on

our line, 1,716 cars carried materials or commodities used in the processing of agricultural products at plants on our line and 288 cars carried other types of agricultural supplies
159 and products, or a total in our received business of 4,673 cars, 3,420 cars were directly tied into agricultural production or processing, 812 cars with construction materials, and 441 cars of other general commodities. (219)

Now, that is an analysis of the carloads received for that period.

The carloads forwarded for the same 6 months period total 4,020 cars. Of that 4,020, 2,400 or 59.7 percent were destined to points within the state of Utah, or in other words, were loaded on our line and delivered at points within the State of Utah.

1,620 cars of 40.3 percent, originated on points on the Utah-Idaho Central and were forwarded to points in other states.

The breaking-down into general classification of those 4,020 cars forwarded indicates that 927 cars represent raw agricultural products going to market, 1,408 cars represent raw agricultural products going to processing plants, such as sugar beets going to beet factories and milk going to the milk condenser, 910 cars represent processed agricultural products going to market, or, in other words, the sugar and the milk after it has been processed; 389 cars represent local products on our line used in processing, such as lime rock quarried on our line going into the sugar factory for use in the manufacture of sugar. The average of the trains was nine and a fraction cars. If the tonnage carried was light enough, individual trains might exceed 12 cars in length, just as some trains were much shorter. The maximum cars over the Collinston hill in one train would be 350 tons or 8 cars. If we doubled, took half up at one time and half up the next time, we could carry 16 cars. A car
160 of potatoes going to Cleveland, Ohio picked up at Brigham would be billed from Brigham City to Cleveland, Ohio, showing on the way bill the routes and junctions of other roads to which the car would move and we would deliver the car with the way bill to either the Rio Grande or the Union Pacific at the interchange. (221) The road making the final delivery would collect the money and through a system of interline accounts would report to us that they had collected the freight on this specific car and that under the divisional ar-

rangement our proportion was so much money. We keep an interline account. The money that is required of us is the money that we have collected for other roads from the consignee, less what belongs to us. (222) We keep an interline account but do not keep a separate balance. It usually requires $35,000 or $40,000 to make our settlements. We keep it in the same account with our other funds, but of course we do not spend it because it does not belong to us.

Cross Examination

I have given carload figures relative to traffic conditions on our road for the last half of 1935. (223) I have not the figures for the whole year of 1935 worked up on this basis. We took the 6 months period as representative. The reason I worked up the last half-year of 1935 was that in that hearing before the Interstate Commerce Commission, it was indicated that the last six-months period of the latest year was a sufficient analysis of the traffic to serve their purpose. I can obtain the figures for the whole year 1934 as to the revenue received from passenger service compared with freight service for the same yar if desired.

I can give the figures for the last half of 1935 showing
161 the number of cars interchanged with other lines as compared with those which originated and also terminated their movement upon our line. Those figures are for carloads forwarded, out of a total of 4,020 cars, 2,336 were locally forwarded, (224) that is, originated on our line and were forwarded to stations on our line, the balance of 1,684 were interchanged with our various steam and electric line connections. As to cars received, out of a total of 4,673, 2,336 were loaded and destined at and to points on our line and 2,337 or just over half were received from our steam and electric line connections. I do not have similar figures so divided for less-than-carload traffic. Our company is a party to through freight tariffs by which we can forward shipments to or receive them from practically all parts of the United States. We use freight cars which belong to the steam railroad lines. Most of the interchanged freight traffic from our line is in cars of road which are general steam line roads. (225)

On redirect examination by the Court:

We have 173 freight cars. Of these 75 are not interchangeable, that is, they are of such construction or condition that

we cannot load them to a steam railroad. There are 98 of them that are steam dump cars or gondola cars, which we purchased to haul beets during times of the year other than the beet season. If there is an equipment shortage we try to get those cars in what we call the coal service, in the service from the coal mines to other destinations. The only time, we ourselves load them to other lines is when they are loaded with lime rock going to sugar factories not located on our line. That is the only commodity we originate in our territory that is adaptable to that type of car.

(Plaintiff's counsel presented plaintiff's Exhibit No.
162 43 headed "Statements of Interstate Commerce Commission concerning electric railways which are contained in various annual reports from 1921 to 1935, inclusive") and offered same in evidence. It was objected to by counsel for both defendants on the ground that it is irrevelant and immaterial, (230) whereupon said objection was overruled by the Court to which defendants' counsel then and there accepted. A copy of said Exhibit No. 43 is hereto attached, consisting of 12 sheets marked 43a, b, c, etc.

Plaintiff next offered in evidence and caused to be marked plaintiff's Exhibit No. 44 a paper purporting to be a statement issued by the Interstate Commerce Commission through its Bureau of Statistics, covering statistics with regard to electric railways for the year ended December 31, 1934. It is statement No. 3576, dated Washington, D. C., August, 1935. Said paper was objected to by counsel for the intervening defendant upon the ground that it purported to be a part of the records of the Interstate Commerce Commission, but did not appear to have been certified by the Commission as an official copy.

The Court: If any point about it I will let counsel be sworn and testify, like you prove a foreign law—if a man knows about it he can swear to it.

Whereupon C. D. Cass, counsel for plaintiff, was called as a witness by and on behalf of the plaintiff, and having been duly sworn testified:

Exhibit No. 44 is composed of numbered sheets from 1
163 to 49 (233) except that the outside sheet is designated as one, the first inside sheet as 1-a and the second sheet

1-b. This report of the Bureau of Statistics, statement No. 3576, dated Washington, D. C. August, 1935 is a correct copy of the report issued by the Commission with regard to electric railways for the year ended December 31, 1934 and this particular document was obtained from the Commission's files itself. It is selected statistics taken from the reports of the electric railways filed with the Commission and the selection was made by the Commission.

On cross examination the witness testified: Exhibit No. 44 is a copy made by the Commission from the Commission's own issuance of that particular document. (234) I procured it from the Commission. I sent down to the Commission after it. One of my office organization went down to the Commission and obtained this document. That is the extent of my knowledge as to its coming from the Commission. Other that it is the same report that is put out year after year by the Commission.

Mr. Thomas: If the Court please I submit the statement of this witness is not sufficient.

The Court: The objection will be overruled. I don't care about argument. Just make your objection.

Mr. Thomas: If the Court please we object to that on the ground, in the first place, that it has not been authenticated, and second, that it is not competent to prove a copy of the records of the Commission except by a certificate of the custodian of those records, namely, the secretary of the Commission. (236)

Nelson Thomas, Attorney for intervening defendant,
164 Interstate Commerce Commission was thereupon called as a witness by and on behalf of the plaintiff and having been first duly sworn testified in substance as follows:

I am not familiar with the reports that the Commission issues, annual statistical reports, in the sense that I know everything about them. I have seen reports of the Commission embodying data which seemed to be similar to that which is set out in plaintiff's Exhibit No. 44. I have not formed a conclusion or expressed any conclusion as to whether or not said exhibit looks as if it might have been changed or altered or made from a different source, or that it does not look natural. I have

simply stated that I don't know that said exhibit is an official report.

The Court: The document will be received subject to investigation by counsel to determine its genuineness and if you discover anything different we will substitute. Whereupon plaintiff's Exhibit No. 44 was received in evidence, a copy of which is hereto attached. (240).

Plaintiff then offered in evidence a photostatic copy of a letter from M. O. Lorenz, Director of Statistics for the Interstate Commerce Commission and a mimeographed copy of letter from C. D. Cass, same being marked plaintiff's Exhibit No. 45. Objected to by defendants as irrevelant and immaterial. Said exhibit was admitted in evidence and a copy of the same is hereto attached.

Counsel for plaintiff presented and offered in evidence as Exhibit No. 46 by reference certain portions of a book marked "Special Reports of the Census Office; Street and Electric Railways 1902, Department of Commerce and Labor" published under authority of an Act of Congress, the portions
165 thereof being Part 1, Chapter 1, pages 3 to 5, Part 1, Chapter 7, pages 101 to 119 inclusive, Part 2, Chapter 4, pages 214 to 217 inclusive. Whereupon said exhibit was objected to by defendant on the ground that it was irrevelant and immaterial. Whereupon the court overruled said objection and admitted said exhibit in evidence.

Counsel for plaintiff offered in evidence and caused to be marked plaintiff's Exhibit No. 47 a document entitled "Special Reports of the Bureau of Census; Street and Electric Railways, 1907, Department of Commerce and Labor" published by authority of an Act of Congress. Counsel stated that they would like to have incorporated in the record by reference the following parts of said document. Part 1, Chapter 4, pages 56, 57 and 58 under the heading "Track on private right of way." Part 1, Chapter 4, page 64 under the heading "Express Freight, and mail cars." Part 1, Chapter 5, pages 92 and 93 under the heading "Mail, express, and freight business." Part 2, Chapter 4, pages 265 to 290. Whereupon counsel for defendants objected to said exhibit on the ground that it was irrevelant and immaterial, which objection was overruled by the court and said exhibit admitted in evidence. (244)

Whereupon plaintiff offered in evidence as plaintiff's Exhibit No. 48, a paper entitled "Central Electric Light and Power Stations and Street and Electric Railways, 1912, Bureau of the Census, Department of Commerce", and asked to incorporate in the record by reference the following parts of said document:

Part 1, Chapter 1, pages 179 to 181, inclusive.

166 Part 1, Chapter 4, page 208, under the heading:

"Track on private rights of way,"

Part 1, Chapter 4, pages 208 and 209, under heading:

"City and suburban and interurban lines."

Part 1, chapter 4, page 209 under heading:

"Rolling Stock."

Part 1, chapter 4, page 210 under heading:

"Electric locomotives."

Part 1, Chapter 5, page 222, under heading:

"Freight, mail, and express business."

Part 1, Chapter 7, pages 240 to 242, inclusive, under heading:

"Operating Revenues and Miscellaneous Income."

Under the heading of general tables—"Table 153," pages 282 to 287, inclusive, showing "Track Mileage."

Table 154, pages 288 and 289 under the heading of:

"Rolling Stock."

Table 161, pages 308 to 340, inclusive, under the heading:

"Operating Revenues".

Said exhibit was objected to by counsel of defendants on the ground that it is irrevelant and immaterial, which objection was overruled by the court and said exhibit admitted in evidence.

Plaintiff's counsel then stated "I want to offer in evidence certain portions of the hearings before the committee on Interstate and Foreign Commerce of the House of Representatives of the 69th Congress, the first session of H. B. 7180 at page 9,

which was the bill which resulted in the Railway Labor Act of 1926. (246)

The court announced that it would take judicial notice of hearing before Congress (247)

Plaintiff's counsel then asked the court to take judicial
167 notice of the hearing before the Senate Committee on Interstate and Foreign Commerce of the 73rd Congress, the Second Session of Senate Bill No. 3266; also to the hearings before the Sub-Committee of the Interstate Commerce Committee of the United States Senate of the 72nd Congress, Second Session in consideration of S. 3892 and S. 4646, which were the bills providing for pensions and retirements for employees of interstate railways and which subsequently became the Railway Retirement Act.

Said evidence was objected to by defendant's counsel as irrevelant and unnecessarily encumbering the record.

The court said: "It is not in the record except that he is calling the court's attention to it. I will take judicial notice of it if you [plaintiff's counsel] will get it before me."

Mr. Thomas: Permit us, if the court please, to preserve the record by renewing our objection to all the testimony just given as having no bearing upon and immaterial to the issues properly before the court.

Mr. Matherson: May the defendant join in that.

The Court: You move to strike it out.

Mr. Matherson. The motion will be to strike.

The Court: The motion will be denied.

Whereupon the plaintiff rested.

On behalf of both defendants' counsel offered in evidence as defendants' Exhibit A a certified copy of the report of the Interstate Commerce Commission dated February 27,
168 1936 in Labor Act, Docket 12, dealing with the classification of the Utah-Idaho Central Railroad Company under the United States Labor Act.

The Court: Any objection to it?

Mr. Howell: We make the objection that it is incompetent, irrevelant and immaterial to any of the issues in this case.

The Court: The objection will be overruled.

Whereupon defendant's exhibit A was admitted in evidence, a copy thereof is attached hereto.

In rebuttal plaintiff offered in evidence its Exhibit No. 49 consisting of oral testimony and exhibits introduced before the Interstate Commerce Commission upon hearing before a Commission examiner in Docket 12, Railway Labor Act, Utah-Idaho Central Railroad Company which exhibit was admitted in evidence by the court. A condensed copy of which is hereto attached.

Whereupon the following proceedings occcurred.

The Court: I will say to you gentlemen the findings in this case are quite simple questions of law that may or may not be difficult.

I will find as the fact in this case, both from the evidence introduced and also from the record submitted before the Commission, that this railroad, this line of the plaintiff company here, is a line of railroad operated by electric power; second, that it is known as, and in fact is, an interurban electric railway which is not now and never has been operated as a part of a general steam railroad system of transportation.

Now, if I make those findings, are you entitled to judgment?

Mr. Howell: Yes, I would say we are, if your Honor please.

Mr. Cass. I don't see how you could decide otherwise.

The Court: I cannot find anything else. That is
169 clearly what the record shows—both records. It is only a question of conclusion of law whether or not from those findings you are entitled to a judgment as prayed.

Mr. Cass: Seems to me upon those findings we must have an injunction to prevent the irreparable damage which has been shown.

Mr. Thomas. I submit, if the court please, the question here is whether or not the railroad comes within the terms of the proviso.

The Court: I have found that it is a line of railroad, that it is an electric interurban railroad line, and that it is not any part of any general steam railroad.

Now, I will also find, if necessary to include all the proviso, that it is not a railroad line that is operated by any other motive power than electricity.

Now, they are the only items in the proviso.

If you people want to think it over from that standpoint of those findings until morning. I will stay here with you and talk to you tomorrow morning about it.

Mr. Howell: You mean the question as to whether or not we are entitled to judgment?

The Court: Or the other side, either.

I don't see how I can avoid making those findings upon the evidence, irrespective of which record you take, either the record made before me or the one made before the Commission. Unquestionably that is what they show.

Mr. Cass: If the court please, if I may make an obser-
170 vation which merely comes to me off-hand, on those findings of fact this plaintiff, if a prosecution was attempted could point to those findings of fact and escape all liability, I should think. Because if it is an interurban railroad it is not subject to this Act.

The Court: Unless it is part of a general steam—

Mr. Cass: But the findings says it is not that.

The Court: You seem to be more jovial about it than the other side.

If you men want to sleep on it—

Mr. Howell: More what?

The Court: More pleasant about these findings than the other side.

Mr. Howell. I think they are right.

The Court: The other side thinks they are wrong, probably.

I am perfectly willing to have you discuss them now; don't want to have to discuss them any other time. And if on those findings it seems to be evident that the judgment should go for the plaintiff, there is not any use in staying here and talking about it.

Mr. Thomas: If the court please, your Honor has made findings which do not include the statutory finding imposed upon the Commission.

The Court: What I am concerned with is whether or not these findings are sufficient to carry a judgment—support a judgment—either one way or the other, because the proviso is for the Commission and also for this court in some way or other to determine whether or not any line operated by electric power falls within the terms of this proviso, and all the
171 terms we are concerned with are the terms of the proviso.

Mr. Howell: With respect to which your Honor has found

The Court: When I find what the terms are, affirmative or negative, that is the end of it.

Mr. Cass: If the court, please, the prayer in the pleadings is simply for an injunction to prevent prosecution. It involves nothing so far as the government is concerned. It simply creates a standstill until they can take this matter forward.

The Court: It stops the district attorney from prosecuting under the penalty clause of this Act.

Mr. Cass. It debars the government of no rights. It is merely a standstill order until they can find out if somebody else has a different opinion than this court.

The Court: Of course, I may be wrong about it. Of course, anybody has the right to appeal.

Mr. Cass: We don't think you are wrong. We think you are right.

Mr. Thomas: Our position is, unless this court can find that the Interstate Commerce Commission lacked authority, failed to give a due hearing, or acted without any evidence to support it, that its findings cannot be contradicted by the court.

The Court: I am going to give you the leeway on that. I am not going to go outside of the terms of this record to make any negative finding one way or the other.

Mr. Thomas: I am not asking a finding. I am just stating our position, if the court please.

The Court: You wouldn't want me to make a finding, I might make it against you.

But I will leave that out, so you can have the advantage of the absence of it. (276)

The above and foregoing, together with Volume II con-
172 taining plaintiff's Exhibit 1-49, inclusive, and defend-
ant's Exhibit A, is all of the evidence introduced and proceedings had at the trial of the said cause which are necessary for review of the rulings assigned as error on this appeal.

Wherefore, Dan B. Shields, individually and as United States Attorney for the District of Utah, defendant appellant, and the Interstate Commerce Commission, intervening defendant appellant, pray that the above statement of evidence be settled, approved and allowed by the above entitled court as a true, full, correct, and complete statement of all the evidence
necessary for review of the ruling assigned as error on
173 this appeal taken and had on trial of said cause for use on the appeal taken to the United States Circuit Court of Appeals for the Tenth Circuit.

LEO F. TIERNEY,
Special Assistant to the Attorney General.

SCOTT M. MATHESON,
Assistant United States Attorney.
Attorneys for the defendant, Dan B. Shields.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

NELSON THOMAS,
Assistant Chief Counsel, Interstate Commerce Commission.
Attorneys for the Interstate Commerce Commission.

The complainant in the above entitled cause hereby waives notice of lodgment of the foregoing statement of evidence including Volume II thereof with the clerk of the above entitled court and agrees that the foregoing statement of evidence and

the exhibits as above set out is true and correct and the court is respectfully requested to approve the same.

J. H. DeVINE,
J. A. HOWELL,
DAVID L. STINE,
C. D. CASS,
ROBERT E. QUIRK,
Attorneys for the complainant.

The foregoing statement of evidence together with Vol-
174 ume II above referred to is in all respects hereby approved and settled as the true and complete statement of the evidence adduced on the trial of the above entitled cause.

Dated this 17th day of February, 1937.

TILLMAN D. JOHNSON, Judge of the United States District Court for the District of Utah.

Filed in United States District Court, District of Utah Feb 17—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Stipulation, February 16, 1937

175 It is hereby stipulated by and between the plaintiff and the defendant and intervening defendant, by and through their respective counsel, that three photostatic copies of each of the Exhibits 1, 12, 14, 22, 23, 24, 25, that portion of Exhibits 49 consisting of Exhibit 26, as introduced before the Interstate Commerce Commission in Railway Docket No. 12, and Exhibit 28, sheets numbered 1 and 2, may be filed with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit as the equivalent of the originals so numbered.

It is further stipulated that Plaintiff's Exhibit No. 32 need not be printed.

Dated February 16, 1937.

J. H. DeVINE,
J. A. HOWELL,
DAVID L. STINE,
Attorneys for Plaintiff.

SCOTT M. MATHESON, Assistant United States Attorney,
Attorney for defendant.

NELSON THOMAS, Attorney for Intervening Defendant.

Filed in United States District Court, District of Utah February 16, 1937, W. B. Wilson, Clerk, By V. P. Ahlstrom, Deputy.

Stipulation Waiving Bond on Appeal

It is stipulated by and between the plaintiff and the defendant and the intervening defendant in the above entitled action, by and through their respective counsel, that the giving and filing of a bond upon appeal in the above entitled
176 matter be and the same is hereby waived.

Dated: February 16, 1937.

J. H. DeVINE,
J. A. HOWELL,
DAVID L. STINE,
Attorneys for Plaintiff.

SCOTT M. MATHESON, Assistant United States Attorney.
Attorney for Defendant.

NELSON THOMAS, Attorney for Intervening Defendant.

Filed in United States District Court, District of Utah Feb —16, 1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Order

177 Good cause appearing therefor, and on motion of Scott M. Matheson, Assistant United States Attorney for the District of Utah,

It Is Hereby Ordered, that the defendant herein, Dan B. Shields, shall have to and including March 27, 1937, within which to docket his appeal in the United States Circuit Court of Appeals for the Tenth Circuit in the above entitled case.

Dated at Salt Lake City, Utah, this 17 day of February, A. D. 1937.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, District of Utah Feb 17 1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy

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Praecipe

178 Comes now Dan B. Shields, individually and as United States Attorney for the District of Utah, by Scott M. Matheson, Assistant United States Attorney for said District, and the Interstate Commerce Commission, by Nelson Thomas, Attorney for said Intervening Defendant, and directs the Clerk of this court to certify a transcript of the record in the above cause to the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

1. Bill of complaint for Injunction and Petition for Declaratory Judgment.
2. Order to Show Cause upon Application for Temporary Injunction and setting same for hearing.
3. Minute Entry of June 27, 1936.
4. Return to Rule to Show Cause.
5. Motion to Dismiss Bill of Complaint.
6. Affidavit of Service of Return to Rule to Show Cause and Motion to Dismiss Bill of Complaint.
7. Minute Entry of August 29, 1936.
8. Amended Bill of Complaint for Injunction and Petition for Declaratory Judgment.
9. Amendment to Amended Bill of Complaint for Injunction and Petition for Declaratory Judgment.
10. Answer of defendant Dan B. Shields.
11. Affidavit of Service of Answer of Dan B. Shields.
12. Minute Entry of September 16, 1936.
13. Minute Entry of September 26, 1936.
14. Petition of Interstate Commerce Commission for leave to Intervene as Party Defendant.
15. Order granting leave to Interstate Commerce Commission to Intervene as Party Defendant.
16. Answer of Interstate Commerce Commission.
17. Reply of Plaintiff to Answer of Defendant.

18. Answer and Reply to Answer of Interstate Commerce Commission, Intervening Defendant.

19. Stipulation of October 12, 1936.

20. Minute Entry of October 12, 1936.

21. Minute Entry of October 13, 1936.

22. Minute Entry of October 14, 1936.

179 23. Minute Entry of October 15, 1936.

24. Findings of Fact, Conclusions of Law.

25. Decree

26. Order of November 23, 1936

27. Order of December 21, 1936

28. Petition for Appeal

29. Order Allowing Appeal

30. Assignment of Errors.

31. Citation on Appeal

32. Affidavit of Service of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Citation on Appeal.

33. Order of January 29, 1937

34. Order of February 13, 1937.

35. State of Evidence in accordance with Equity Rule 75; Volume I, Transcript of the Testimony, and Volume II, Plaintiff's Exhibits 1-49, inclusive and Defendant's Exhibit A.

36. Stipulation of February 16, 1937, waiving bond on Appeal.

37. Stipulation of February 16, 1937, designating Exhibits which may be reproduced but not printed.

38. Order of February 17, 1937.

39. This Praecipe.

40. Affidavit of Service.

41. Clerk's Certificate.

Dated at Salt Lake City, Utah, this 17th day of February, A. D. 1937.

SCOTT M. MATHESON, Assistant United States Attorney.
Attorney for Defendant Dan B. Shields.

NELSON THOMAS, Assistant Chief Counsel, Interstate Commerce Commission.
Attorney for Intervening Defendant.

Filed in United States District Court, District of Utah Feb 17—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Affidavit of Service

The United States of America, District of Utah, Central Division. ss.

WINNIE ESTERAK, being first duly sworn upon her oath, deposes and says:

That she is a Clerk in the office of the United States At-
180 torney for the District of Utah; that on February 17, 1937, she served The Utah Idaho Central Railroad Company, a corporation, Complainant in the above entitled cause, with Praecipe by placing a true copy of said Praecipe in a franked envelope of the United States addressed as follows, to wit:

Messrs. DeVine, Howell & Stine,
Attorneys at Law,
Eccles Building,
Ogden, Utah,

and deposited the said envelope in the United States Post Office at Salt Lake City, Utah, for mailing and delivery to Counsel for said Complainant, Utah Idaho Central Railroad Company.

(Seal) WINNIE ESTERAK.

Subscribed and sworn to before me this 17th day of February, A. D. 1937. W. B. Wilson, Clerk U. S. District Court, For the District of Utah By V. P. Ahlstrom, Deputy.

Filed in United States District Court, District of Utah Feb 17—1937 W. B. Wilson, Clerk By V. P. Ahlstrom, Deputy.

Certificate of Clerk

United States of America, District of Utah. ss.

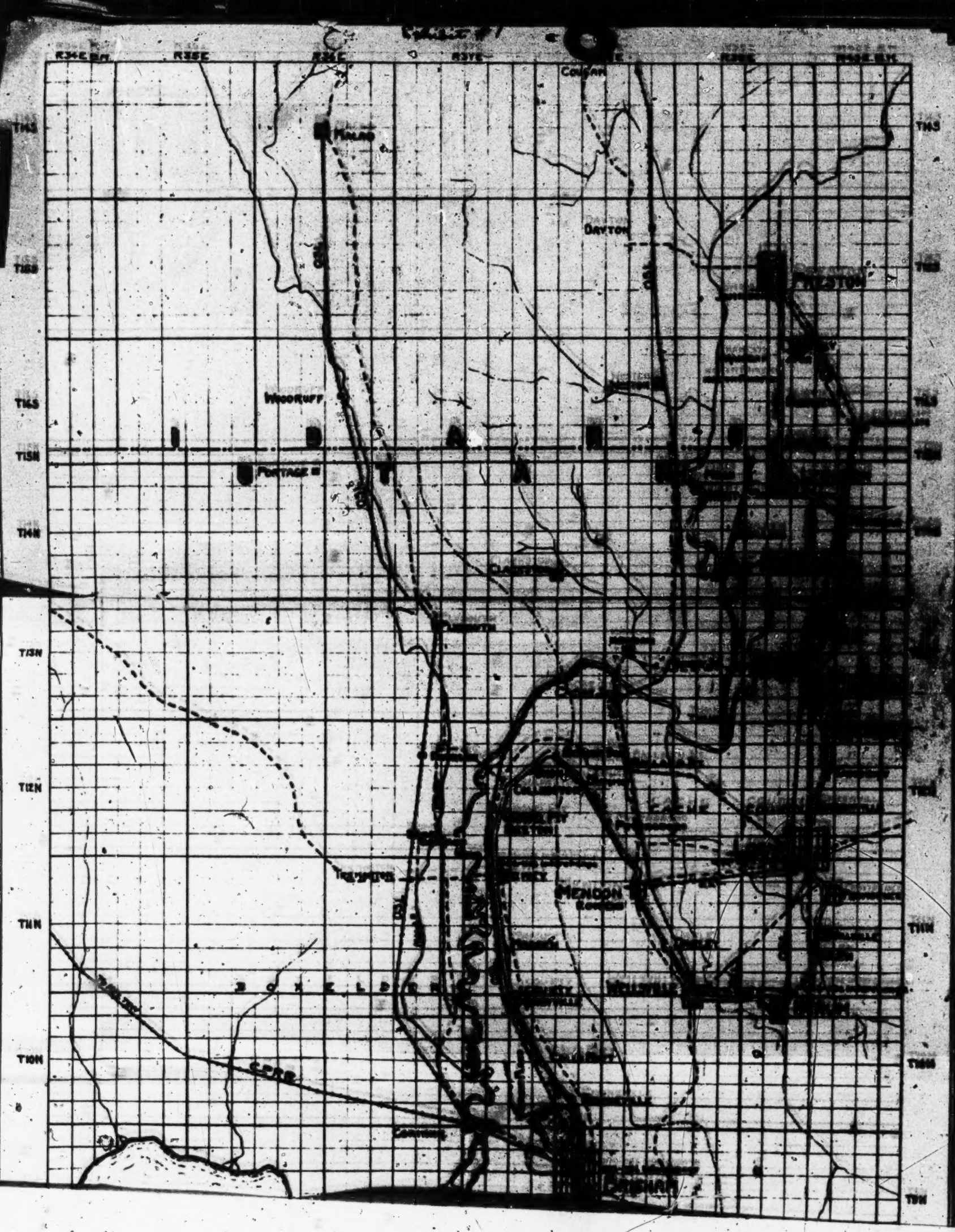
I, W. B. Wilson, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to 668 contains a full, true, correct and complete copy of the original record and proceedings designated in the praecipe for a transcript of the record in the cause numbered 12924, Equity, wherein The Utah Idaho Central Railroad Company, a corporation, is Plaintiff, and Dan B. Shields, individually and as United States Attorney for the District of Utah, is Defendant, and Interstate Commerce Commission is the Intervening Defendant, now remaining among the records of the said Court in my office.

I further certify that the original Citation on Appeal, and original order Extending time to docket appeal, in this cause is hereunto annexed and transmitted herewith.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Salt Lake City, Utah, this 23rd day of April, A. D. 1937, and the 161st year of the Independence of the United States of America

(Seal) W. B. WILSON, Clerk.

Filed April 26, 1937. Albert Trego, Clerk.


R34E
R35E
R36E
R37E
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Dayton
Preston
Moorcroft
Portage
Paradise
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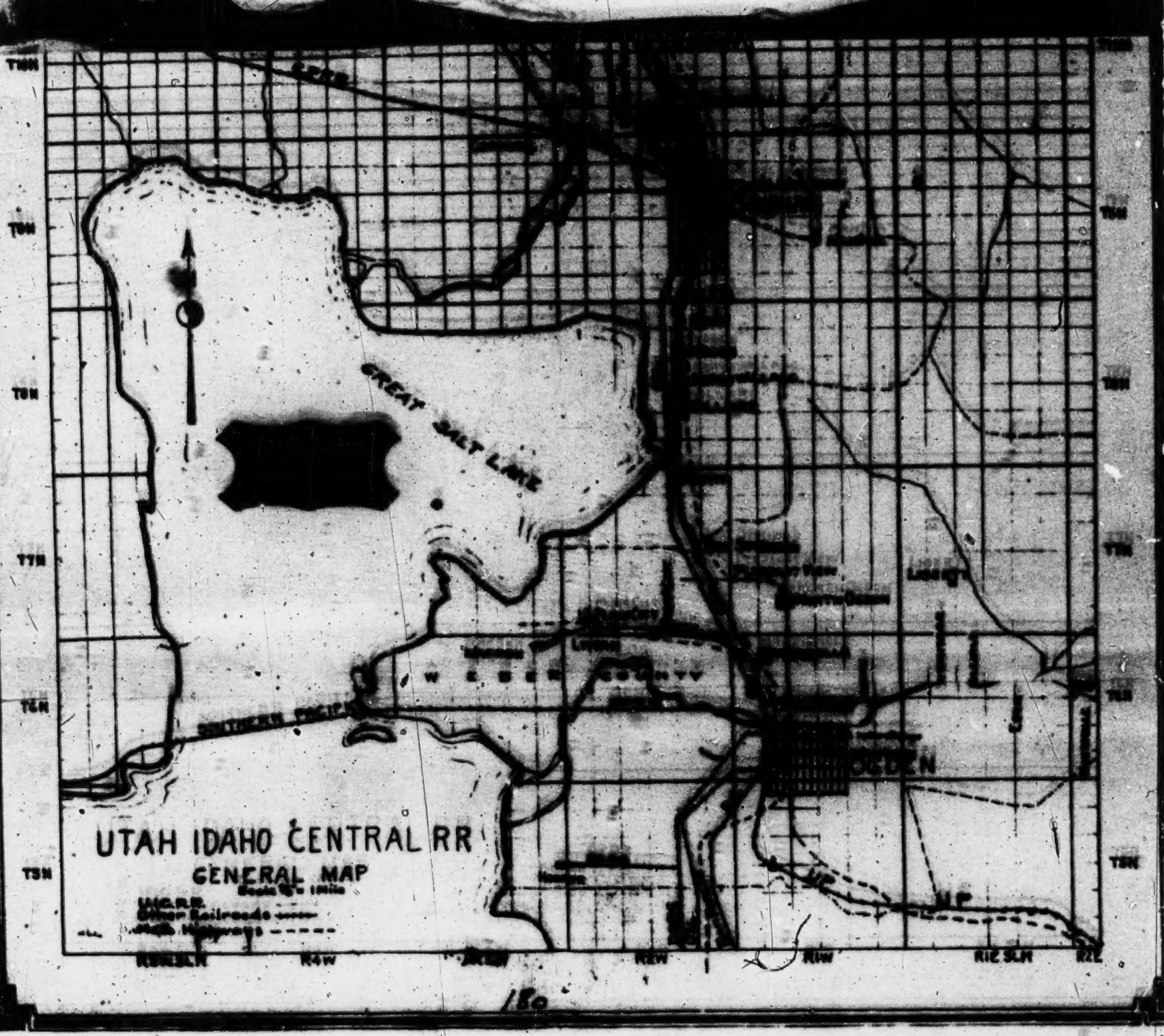

GREAT SALT LAKE
OGDEN
UTAH IDAHO CENTRAL RR
GENERAL MAP
U.I.C.R.R.
Other Railroads
R4W
R1W
R1E SLM

Exhibit 2 (Abstracted)

181 The Utah Idaho Central Railroad has franchises to use the streets and highways of the following communities: City of Lewiston, City of Richmond, City of Smithfield, Town of Hyde Park, Logan City, Cache County, Town of Providence, Town of Millville, City of Hyrum, City of Wellsville, City of Mendon, Brigham City, Town of Perry, City of Willard, Ogden City, Box Elder County and Weber County, all in Utah, and City of Preston and Franklin County in Idaho. All of these franchises authorize the construction and operation of a "railroad" or "railway", but require either that the motive power of the carrier be electricity or that it not be steam. The following communities (but not the others named above) authorize the carrier to operate only "street and interurban" or "interurban" or "street" railways: City of Lewiston, Cache County, Mendon City, Town of Perry, Willard City, Ogden City, City of Preston and Franklin County.

Exhibit No. 3

Historical Sketch of The Utah Idaho Central Railroad Company and its Predecessor Corporations.

317 The Present Utah Idaho Central Railroad Company is the result of the combination and extension of several small street car and interurban properties.

It had its inception in Ogden, Utah about 1890 from a street car system, approximately three or four miles long upon which was operated some horse drawn cars. This Company eventually became insolvent and when liquidated its assets were purchased by a group of Northern Utah citizens headed by the late David Eccles, who organized a corporation under the laws of Utah which was known as the Ogden Rapid Transit Company. This change took place in the late nineties and thereafter marked the beginning of the rehabilitation, electrification and further expansion of the properties which are known today as the Utah Rapid Transit Company located within the corporate limits of Ogden City and The Utah Idaho Central Railroad Company, the interurban line in question.

Sometime in the late nineties a corporation was formed under the name of the Ogden and Northwestern Railroad Company which built a small interurban line of railroad from the North

City limits of Ogden along the country roads to Hot Springs in Box Elder County and operated thereon for passenger and some freight business. Their initial power being furnished by a small steam locomotive.

The rails of this new Company connected at the North City limits of Ogden with the rails of the Ogden Rapid Transit Company on Washington Avenue. The two companies jointly handling interurban traffic.

Subsequently the same interests who owned or held control of the Ogden Rapid Transit Company acquired the ownership of the Ogden and Northwestern Railroad Company and from that time on operated common equipment over both properties.

Approximately in the year 1910 the Ogden Rapid Transit Company as a corporation acquired the property of the Ogden and Northwestern Company and equipped the latter Company for an electric interurban operation and also, extended the line along the public highway from Ogden Hot Springs to Brigham City, Utah, which is located twenty-one miles north of Ogden, operating electrically over the entire line for the transportation of passengers and freight.

Contemporaneously with this development between Og-
318 den and Brigham City, practically the same people who owned the Ogden Rapid Transit Company built a line of street and interurban railway in the City of Logan, Cache County, Utah, extending same northward through Hyde Park to Smithfield, Utah, a distance of about eight miles and south through Providence, Millville and Hyrum to Wellsville, Utah, a distance of approximately twelve miles, operating over this interurban by means of electrical power and handling passenger and freight business. The freight business being largely agricultural products produced in the vicinity of their line of railroad.

About the month of May 1914 the Ogden Rapid Transit Company operating in Ogden City and from Ogden, Utah to Brigham, Utah and the Logan Rapid Transit Company operating in the Logan City and between Wellsville, Utah and Smithfield, Utah were consolidated into a single corporation under the laws of the State of Utah known as the Ogden, Logan and Idaho Railway Company.

This corporation for a time thereafter operated all of the properties formerly owned and controlled by the Ogden Rapid

Transit Company and the Logan Rapid Transit Company, and also, commencing about the time of the consolidation rebuilt a portion of the line extending from Ogden northward through Brigham City and constructed a new line from Brigham City north over the Collinston Divide into Cache Valley connecting with the southern terminus of the Logan Rapid Transit Company. Also, extending the northern terminus from Smithfield, Utah to Lewiston, Utah a distance of eleven miles, and eventually crossing the state line to Preston, Idaho, which lies approximately six miles north of the Utah State Line.

The Ogden, Logan and Idaho Railway Company continued thereafter to operate the street car system in the City of Ogden, the street car system in the City of Logan, and also the interurban line which had been developed out of the interurban properties of the Ogden Rapid Transit Company and the Logan Rapid Transit Company continuing to carry on the same general character of business of transporting both passengers and freight with electric cars.

In the latter part of 1919 it seemed desirable to segregate the interurban operations of the Company from the purely local street car operations in the City of Ogden and the suburban operations extending east from Ogden City into Ogden Canyon. Accordingly, a new corporation was formed known as the Utah Rapid Transit Company which took over and operated the local street car system in Ogden, Utah and the suburban line running east from Ogden into Ogden Canyon. The ownership and operation of the interurban railroad from Ogden, Utah to Preston, Idaho remaining with the Ogden, Logan and Idaho Railway Company which had changed its name to Utah Idaho Central Railroad Company.

Utah Idaho Central Railroad Company, a Utah cor-
319 poration continued to operate these interurban lines until the latter part of the year 1926 when a corporate reorganization took place and the properties were then continued under the ownership and operation of The Utah Idaho Central Railroad Company, a Delaware Corporation which is the present owner and operating company.

Throughout all of these developments of this interurban property through the various companies previously named the personnel of its employees and owners has to a very large extent remained that of the original street car and interurban

companies, namely the Ogden Rapid Transit Company and the Logan Rapid Transit Company.

Exhibit No. 4

Description of the Purpose and Method of Operations of The Utah Idaho Central Railroad Company.

320 As indicated in the history of the Corporate development of The Utah Idaho Central Railroad Company the property as now exists was practically completed in the latter part of the year 1915 and represents as previously explained the joining together of individual small interurban railroads previously constructed in Cache Valley and in Weber and Box Elder Counties.

These roads were practically entirely financed by local citizens in the Northern Utah area who were collectively interested in the various agricultural and agricultural manufacturing pursuits which are common to this section, such as dairying and milk processing; sugar beet raising and sugar manufacturing; canning; livestock; poultry; fruits; vegetables, etc.

These people were naturally also interested in the economic, cultural and educational development of the various small communities which are now contiguous to this interurban railroad. Their idea in the construction of the constituent properties and in the later joining together of these properties into one line was to furnish an easy convenient method of intercourse between those communities and also, to furnish a method of transporting the raw products grown in the area to the agricultural processing and manufacturing plants which they developed within the area.

This requirement could be best and most satisfactorily served by the construction of an interurban electric line with its consequent frequent and rapid passenger service and its natural ability, by reason of its type, to provide a convenient and economical method of moving raw products at frequent intervals, and over short distances to the processing plants.

This type of service was and is distinctly within the physical scope of an interurban railroad in that as will be later shown, its entire physical construction was designed to accommodate small trains, rapidly moving, at frequent intervals, and it is a

character of service not possible of being furnished by the ordinary steam railroad, in that a major requirement of steam railroad operation is long trains and a service largely influenced as to schedule by the availability of sufficient tonnage to approximate the rating of the power used. The continual development in steam transportation of larger power with its consequent longer trains and longer intervals between those trains creates a physical condition which can not be adapted to the type of service performed by an interurban railroad.

To illustrate this point, such services as the following
321 have been performed by The Utah Idaho Central Railroad Company. The handling of raw milk from concentration points to condenseries. This service must be performed with a minimum of time enroute and a definite arriving time at the condensery to fit in with their daily evaporation program. This movement is generally accomplished with the power unit and one car and usually entails special service.

This Company has also performed a service of moving shelled peas from vineries to canning factories. In the canning of peas it is necessary in order to preserve their natural flavor that a minimum amount of time be consumed from the field to the cannery, peas being harvested in the fields, taken to the vinery for shelling, and moving in lug boxes rapidly into the cannery before either time or temperature can start the change in flavor. This movement likewise was accomplished with one or two car trains and special service.

Another typical interurban movement is the handling of ripe tomatoes in stock cars for movement into the canning factory, usually with special service.

Large quantities of beets are handled from various loading stations in small trains to the sugar factories for processing.

These are only typical of the type of service performed and generally represent the transportation link of the industrial development contemplated as a unit by the same people who constructed the processing plants at the same time they constructed this interurban railroad.

Later on in the presentation an exhibit will be introduced showing the number of trains operated daily on this property which in itself will present a more concrete picture of the frequency of service actually used in the operation of the property.

Likewise there will be presented exhibits showing the large number of sidings and spurs available for the loading of raw products and one showing the frequency of available passenger stops for the convenience of short distance interurban travel.

The Company at the present time in addition to the operation of numerous small freight trains operates both one and two car interurban passenger trains and gasoline motor busses.

A distinctive feature in our interurban passenger operation which tends to illustrate the type of service furnished the communities involved is the transportation of school children. The providing of educational facilities in this section is through the location of high schools at central points rather than in each community and in the carrying out of this policy, at public expense students are brought from their home to these centrally located schools.

Our interurban operation fits well into this plan in that
322 very large numbers of these students are transported by this interurban service at a small cost from their homes to these central schools as will be shown in a later exhibit. This travel amounts to from 175,000 to 210,000 passengers per year and is largely accomplished through the operation of short distance special school trains.

The Company operates both an interurban bus service generally paralleling its line of railroad and a local bus service serving the Utah State Agricultural College at Logan.

For many years Pick-up and Delivery service has been rendered at all available points in connection with package freight. A daily package merchandise train is operated making a round trip from Preston, Idaho and return during the night hours.

This train is powered by an interurban electric car constructed so as to make a large portion of the car available for the handling of package freight. Each car also, being equipped with refrigeration facilities for the handling of perishable commodities in summer weather and with heating facilities for their handling during the winter weather. The locomotive unit on this train is likewise sufficiently powered to permit the hauling of other cars of package freight.

As will be shown in a later exhibit a substantial portion of the mileage of the property lies on city streets and county roads. In the cities and towns of Mendon, Wellsville, Logan, Hyde Park, Smithfield, Richmond, Lewiston, and Preston, the

main line runs on the principal business street. In the City of Ogden it comes within one block of the heart of the business district and in the other communities through which the Company operates their main line is on public streets in very close proximity to the principal business section.

As has been shown in the previous exhibit the right to occupy these city streets and to operate through these business districts is limited to an electric interurban operation which in itself is a legal barrier against the operation of long freight trains or an operation of the same general character as that of so called steam railroads.

Exhibit 5 (Abstracted)

323 The Utah Idaho Central Railroad owns and operates in freight service the following freight hauling units:

Five electric locomotives, Nos. 901 to 905, inclusive. These are what are commonly known as fifty-ton locomotives. Their maximum hauling capacity on any portion of the railroad in either direction is 1,000 tons or approximately 22.2 cars, half loads and half empties. On many parts of the main line these locomotives are unable to handle more than 230 tons, or approximately 5 cars, half loads and half empties.

These locomotives, therefore, are capable of handling over the main line of the railroad, depending upon the grades of the various sections of the line, from 230 tons or 5 cars, trailing load, to 1,000 tons or 22.2 cars, trailing load.

Freight cars are sometimes handled by what is known as "500 Class Passenger Motors". The freight car hauling capacity of these passenger motors is a maximum of 175 tons, trailing load, over part of the line and a maximum of 90 tons, trailing load, over other parts of the line. These 500 Class Passenger cars, therefore, are capable of handling over the main line of the railroad from 90 tons trailing load, to 175 tons trailing load, depending upon the grade over which the movement is made.

In addition to the foregoing, there are freight hauling units Nos. 505, 510, 801, 951 and 952. Three of these five freight hauling units were built in the company shops. Two of them are converted passenger cars changed over for freight hauling purposes by the changing of the gear ratios. The capacity of these five freight hauling units, for handling freight trains over the main line of the railroad, is the same as the capacity of the "500 Class Passenger Motors" set out in the above paragraph.

(Plaintiff's Exhibit No. 6, offered and received in evidence, is in words and figures as follows:)

"List of Equipment Owned by the Utah Idaho Central Railroad Company
Showing Whether Interchanged With Steam Railroads

No. of Units	Class	M. C. B. Designation	Description	Interchangeable with Steam Railroads	Reason why not interchangeable
5	Locomotives	-	Westinghouse Baldwin Electric Locomotives 1500/750 volts D.C.	No	Interurban Electric Locomotives.
2	"	-	35 Ton Electric Loco. 1500/750 V D.C.	No.	Interurban Electric Locomotives
2	Express Cars	-	Self Propelled electric express car 40 T 1500/750 V DC	No	Interurban Electric car
2	Merchandise Cars	-	Self propelled Electric Mdse. Cars 1500/750 V DC		
15	Passenger Motors	-	Self Propelled Passenger Motor cars 1500/750 V DC	No	Interurban Electric car
7	Passenger Trailers	-	Passenger Carrying Trailer	No	All wood construction non ARA Brake Rigging
2	Gondolas	C.M.	Flat bottom 60000 cap.	No	" " " " " " "
1	Flat Car	F.M.	Flat car 40000 capacity	No	" " " " " " "
12	" "	F.M.	Flat car 60,000 capacity	No	" " " " " " "
15	Box Cars	X.M.	Box Cars 60000 capacity	No	" " " " " " "
22	Ballast	M.W.B.	Roger Ballast 80000 capacity	No	" " " " " " "
3	Box	V.S.	Ventilated Box Cars 50000 cap.	No	" " " " " " "
7	Refrigerators	R.S.	Refrigerator Cars 50000 cap.	No	" " " " " " "
12	Stock Cars	S.M.	Stock Cars 60,000 capacity	Yes	" " " " " " "
1	Flat	F.M.	Steel Flat 100000 capacity	Yes	
98	Gondolas	F.S.	Beet & Coal cars, all steel, 100000 capacity		

(Plaintiff's Exhibit No. 7, offered and received in evidence, is in words and figures as follows:)

"Statement of Substation Power

335 "Installations on The Utah Idaho Central Railroad and tonnage limits as indicated by size of machines and location of contigous grades.

"Ogden, Utah, Mile Post 0—One motor Generator set 500 KW Will carry 500 ton load.

"Hot Springs, Utah, Mile Post 9—One motor generator set 500 KW. Will carry 550 ton load.

"Dewey, Utah, Mile Post 36—2 motor generator sets 500 KW each. Will carry 550 ton load.

"Smithfield, Utah, Mile Post 75—2 Motor generator sets, 500 KW each. Will carry 1000 ton load."

(Plaintiff's Exhibit No. 8, offered and received in evidence, is in words and figures as follows:)

"The Utah Idaho Central Railroad Company.

336 "Carrying Capacity Present Electrical Positive Feeder and Trolley Circuit and Negative Rail Circuit.

"The capacity of the Electrical Conductors are limited by their properties to carry amperes or quantity of current to the furtherest point from the station or sub-station without an impractical voltage drop.

"The following calculations will show that the positive and Negative Conductors are operating at their maximum practicable capacity with the tonnage ratings used over the controlling grades.

"The calculations show that with a 550 ton northbound train on the Brigham grade and another train at the Hyrum grade the approximate volts lost between these points and the substation is 500 volts. The effective voltage is approximately 1000. This we consider a practical load limit for the present system of conductors. Actual train loads tested in the past have confirmed these calculations quite closely.

"The joint resistance of the entire circuit consisting of 4/0 copper trolley wire, 7/16" steel catenary cable, 767,000 CM

aluminum feeder 70# steel rail and 4/0 copper bonds is .122 ohms per mile.

"Brigham Grade. Location 18 miles north of the Ogden Substation and 17 miles from the Dewey Substation. A train of 550 tons northbound makes a total power demand of approximately 660 K.W. Reduced to amperes this is $\frac{660,000}{1500}$ or 440 amperes. Amperes or Kilowatts supplied by the respective stations with no other load between Ogden and Dewey is inversely proportioned to the distance the load is from the substations. in this case Dewey will supply 214 amperes times 1500 volts or 320.5 K.W. Ogden portion of this load is 226 amperes times 1500 volts or 339.5 K.W. The volts drop is amperes times miles times ohms per mile or 226 times 18 times .122 which is 470 volts loss from the substations to the locomotive. The effective volts at the locomotive being 1500 minus 470 or 1030.

"2-

"An attempt to move a 1100 ton train up this grade would result in approximately a total power demand of 1320 K.W. Power demand raises in proportion, if the speed is not changed. Amperes would be twice 440 or 880. Portion of current and power furnished would be twice the amount shown for 550 ton train or Dewey 428 Amperes or 641 K.W. and Ogden 552 Amperes or 679 K.W. Volts drop from the substation to the Locomotive would be 470 times 2 or 940. The effective volts would be 1500 minus 940 or 560 which would not move the load—other tonnages would be in proportion.

"Hyrum Grade—Location 22 miles north of Dewey Substation and 17 miles south of Smithfield Substation. A train of 550 tons northbound makes a total power demand of approximately 660 K.W reduced to amperes this is $\frac{660,000}{1500}$ of 440 amperes. Amperes or Kilowatts supplies by the respective stations with no other load between Dewey and Smithfield is inversely proportioned to the distance the load is from the substations. In this case Dewey will supply 193 amperes times 1500 volts or 290 kilowatts. Smithfield portion of this load is 247 amperes times 1500 volts or 370 kilowatts. The volts drop is amperes times miles times ohms per mile or 247 times 17 times .122 which is 505 volts lost from the substation to the locomotive. The effective volts at the locomotive being 1500 minus 505 or 995.

"An attempt to move a 1100 ton train up this grade would result in approximately a total power demand of 1320 kilowatts. Power demand raises in proportion if the speed is not changed. Amperes would be twice 440 or 880. Portion of the current furnished would be twice the amount shown for a 550 ton train or Dewey 396 amperes or 580 kilowatts and Smithfield 247 amperes or 740 kilowatts. The volt drop from the substation to the locomotive would be 505 times 2 or 1010 volts. The effective volts would be 1500 minus 1010 or 490 volts which would not move the load—other tonnages would be in proportion."

(Plaintiff's Exhibit No. 9, offered and received in evidence, is in words and figures as follows:)

"Before The Interstate Commerce Commission

"The Utah Idaho Central Railroad Company

Character of Track Construction

		Main Line Miles	Branch Line Miles	Sidings Spur Yards Miles	Total
85#	Rail	2.26		.06	2.32
75#	"			1.53	1.53
70#	"	80.52		2.01	82.53
65#	"	11.19	.73	3.10	15.02
60#	"	.66		2.56	3.22
45-48	"		20.39	26.19	46.58
40#	"			1.48	1.48
Totals		94.63	21.12	36.33	152.68
Miles Tieplates		11.30			11.30

"All Cross Ties 6#x8#x8'0"

" " " Spaced 2'0" on center 2640 per mile"

Exhibit 10 (Abstracted)

219 The car capacity of spur and passing tracks on the Utah Idaho Central Railroad is shown by the following table:

Car Capacity	Number of Spur or Passing Tracks	Car Capacity	Number of Spur or Passing Tracks
2	1	17	4
3	0	18	1
4	3	19	1
5	2	20	6
6	7	21	2
7	3	22	1
8	6	23	5
9	1	24	0
10	2	25	1
11	5	26	3
12	1	27	5
13	2	28	0
14	3	29	1
15	1	30	4
16	2	31	1
		32	1

The average length of the spur or passing tracks is 16 cars; the maximum, 32 cars; and the minimum, 2 cars.

344 (Plaintiff's Exhibit No. 11, offered and received in evidence, is in words and figures as follows:)

Exhibit No. 11

"The Utah Idaho Central Railroad Company, Miles Main Line Track Located in Public Street and Public Highways.

Main Line Ogden to Preston

Location	Mile Post	to	Mile Post	Miles Main Track
Ogden	0.0		.93	.93
Willard	13.32		14.12	.80
Perry	16.81		17.27	.46
Brigham	19.84		21.86	2.02
Honeyville	30.30		30.49	.19
Mendon	50.18		51.25	1.07
Wellsville	55.50		56.60	.88
Hyrum	59.87		60.32	.45
Millville	63.62		64.22	.60
Providence	65.43		65.96	.53
Logan	66.90		68.88	1.98
Hyde Park	72.16		72.97	.81
Smithfield	74.09		76.07	1.98
Richmond	60.56		81.28	.72
Preston	94.02		94.70	.68
				14.10

Ex. 11

"Plain City Branch

"Harrisville to Plain City

Location	Mile Post	to	Mile Post	Miles Main Track
County Road	0.0		1.88	1.88
" "	2.28		3.09	.81
" "	3.40		5.90	2.10

"Plain City Junction to Warren

County Road	0.0	0.35	.35
			5.14

"Quinney Branch

County Road	Mills Branch	1.40
345 Grand Total		20.64

"Percentage of road on Public Streets 18.2%."

Before The Interstate Commerce Commission

Re Railway Labor Act)
Docket #11.) Exhibit #12

345½ Various Station Plats on The Utah Idaho Central Railroad Company showing restrictive curvature of turnouts, sidings, and spurs.

MICROCARD

TRADE MARK ®

22

8|3

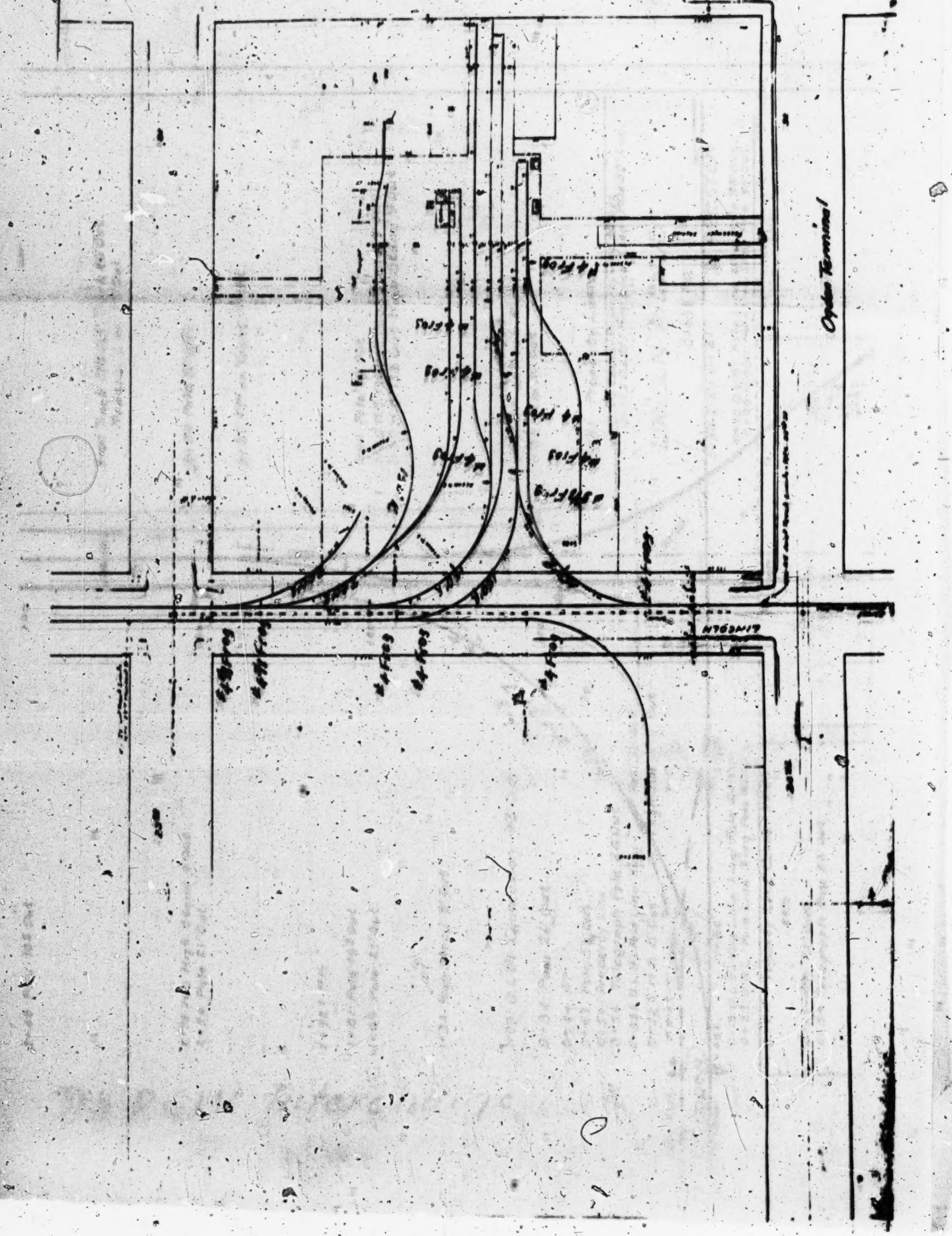
1

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6|0|1

9|6|6

microcard


Ogden Terminal
LINCOLN

D & R G W Railroad

Ogden

2+40 Pole 10' Out.

2+36 N.B High Stand 9' Out
2+34 Pole 21' Out.

1+92.5 P.F.

1+81 Pole 19' Out.
1+69 Pole 21' Out.

1+34 High Stand 9' Out

1+00 O.L.&U. Connection 42' Out

0+84 Pole 21' Out.
0+64 P.F.
0+63 Pole 38' Out.
0+56 Property Line
0+54 Telegraph Pole 28' Out
0+35.5 O.L.&U. Pole Line Xing Pole 30' Out.
0+32.5 N.B. 8' Out High Stand 9' Out.
143 N.B. 44 P.F. 97 P.F. 97
TO OGDEN
0+18 O.L.&U. Pole Line Xing Pole 84' Out
0+23 U.P.R.L. Pole Line Xing Pole 92' Out.
0+24 Property Line Corner 79' Out.
0+47 P.F. 22' Out
0+54 Telegraph Pole 98' Out.

3+00 Track 138 Out Track 25' Out.
Property Line 37' Out

2+58 Pole 38' Out.

2+27 P.F. on Track Right.

1+68 Pole 38' Out
1+60 N.B. 138 Out High Stand 9' Out
1+53 N.B. 138 Out High Stand 9' Out.

1+00 Track 138 Out.
0+91 P.F. on Track Right.
0+84 Pole 30' Out.

0+48 Property Line.
0+48 Corner Property Line 38' Out.
0+35.3 O.L.&U. Pole Line Xing Pole 85' Out.

LINCOLN AVENUE
0+03.2 P.C.

6+00 & O.L.&U. R.T. TO PRESTON

0+18 O.L.&U. Pole Line Xing Pole 38' Out.
0+23 U.P.&L. Pole Line Xing Pole 34' Out.
0+24 Property Line Corner 118' Out
Spur 78' Out.

N.B. 0+92

GRANT

AVE.

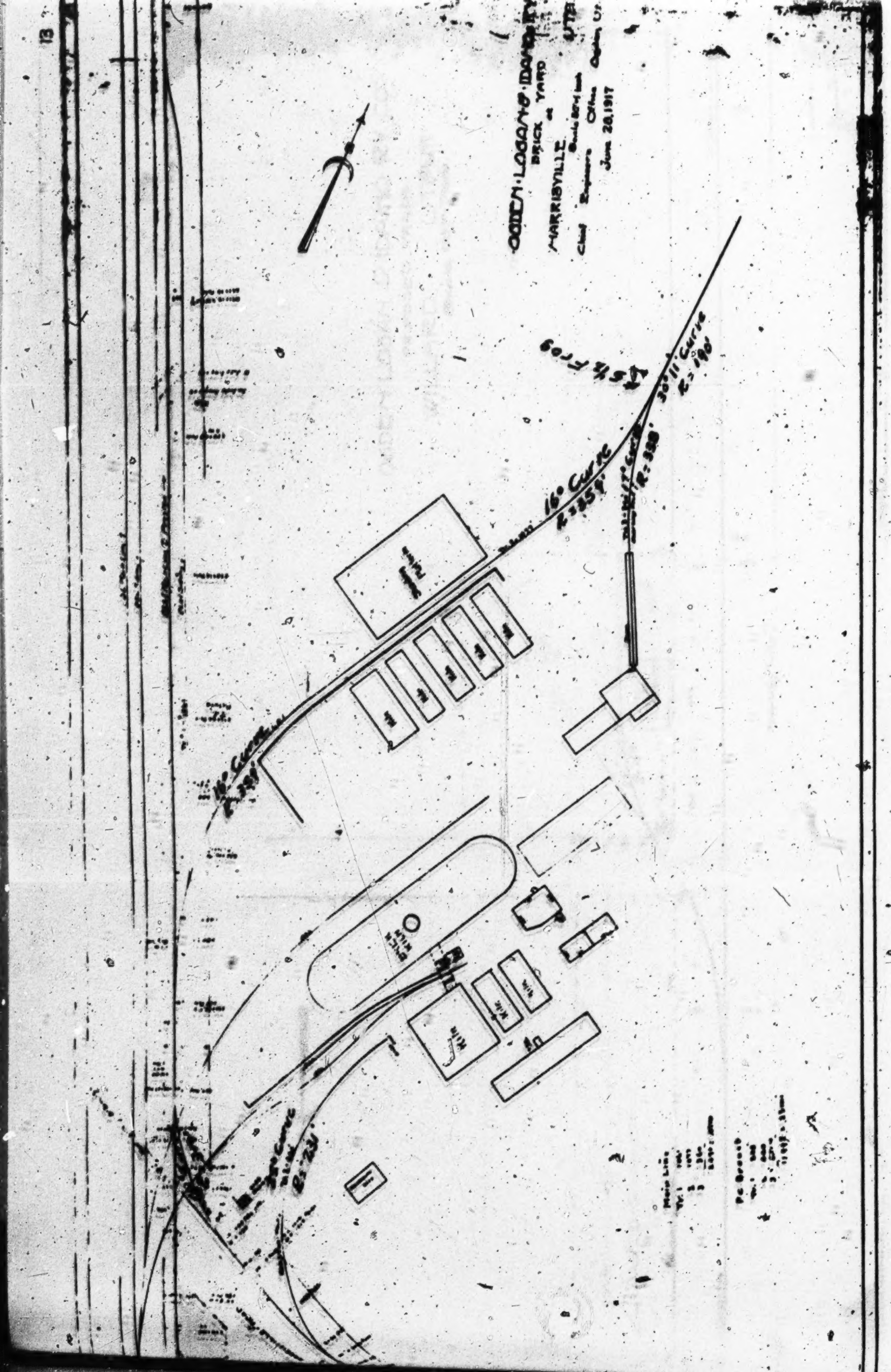
100' R

60° Curve
R 100'

COLN

American Con Spur
Ogden

UTAH IDAHO CENTRAL R
GENERAL LAYOUT
CAR BARNS, REPAIR SHOP
AND
FREIGHT YARDS
AT
OGDEN, UTAH.


Brick Yard
16° Curve
R=358'
30°11' Curve
R=190'
Water Tank
Pump House
Engine House
Coal
Ash Pit
Turn Table
Water Tank
Pump House
Engine House
Coal
Ash Pit
Turn Table

OGDEN LOGAN & IDAHO RY & CO.

PROPOSED YARDS.

WILLARD, UTAH

Scale 50'=1 inch.

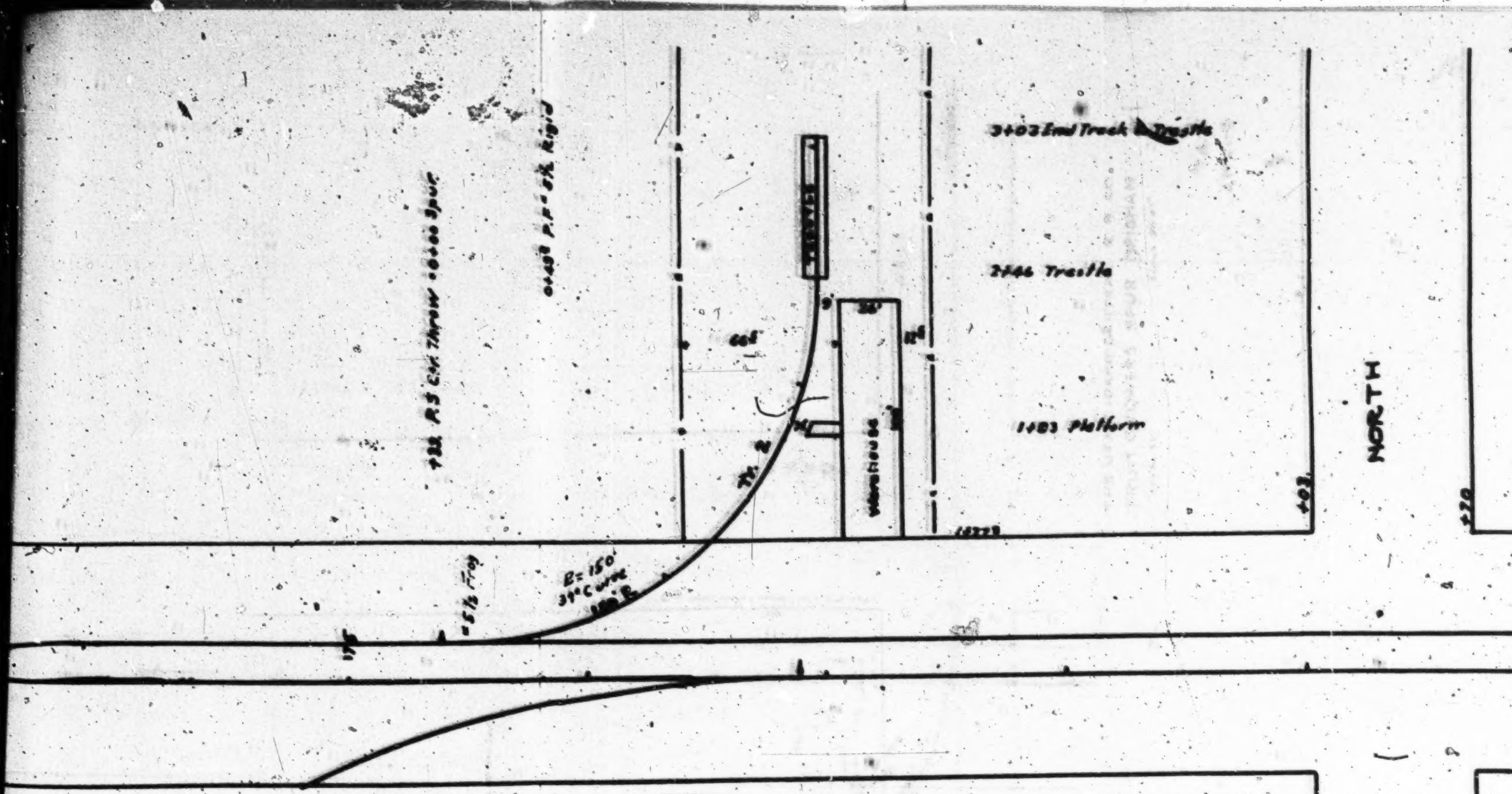
8TH STREET

4 Engs

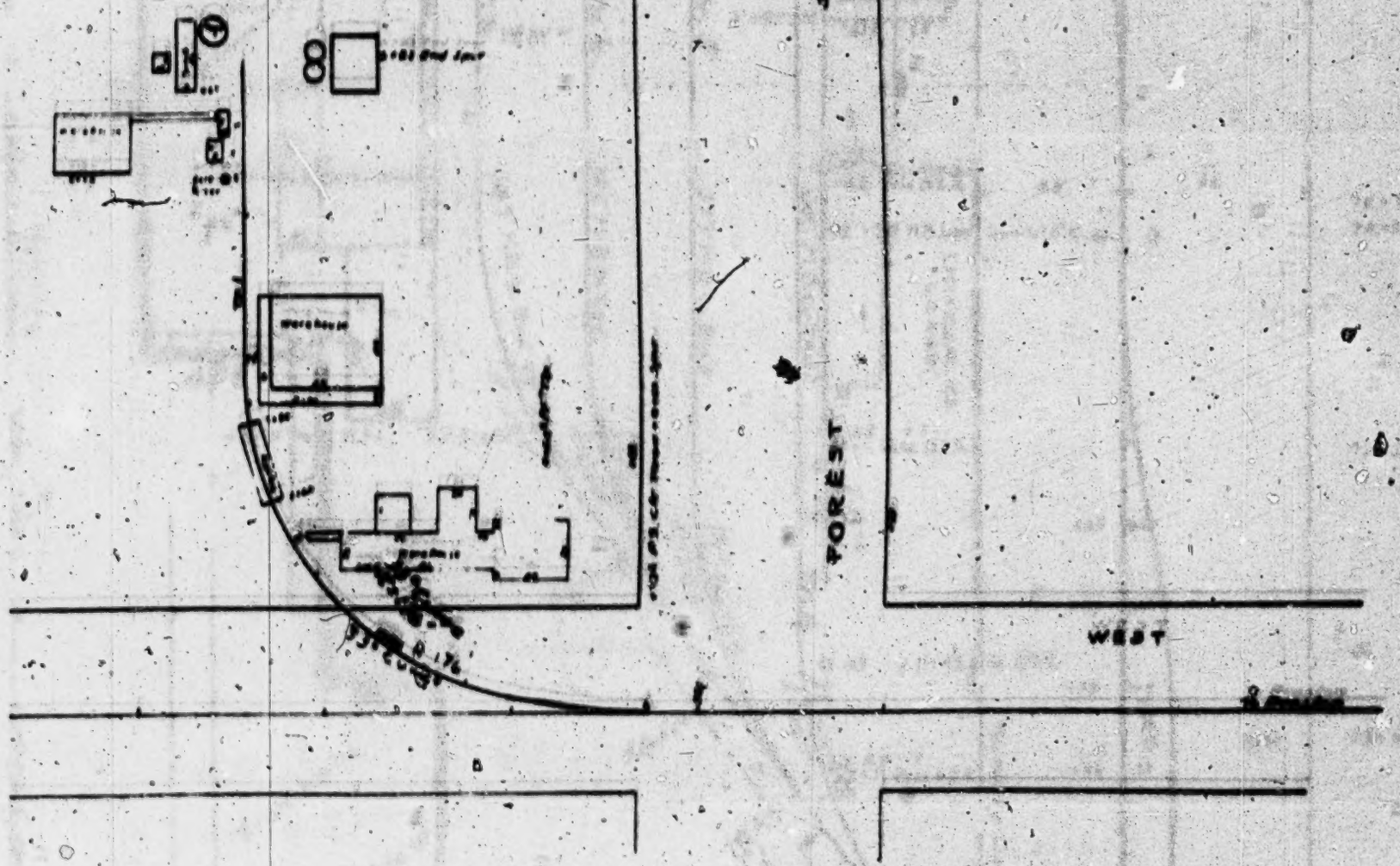
28° Curve

Property Line

Property Line ?



Cosh Feed Spur
Brigham



THE UTAH IDAHO CENTRAL R.R. CO.
FRUIT GROWERS SPUR BRIGHAM

74
4M 21-6

FOREST AVENUE

O.L.&J. DEPOT

LION COAL Co. LEASE

Property Line

660

396'

165'

342'

373' HB to End

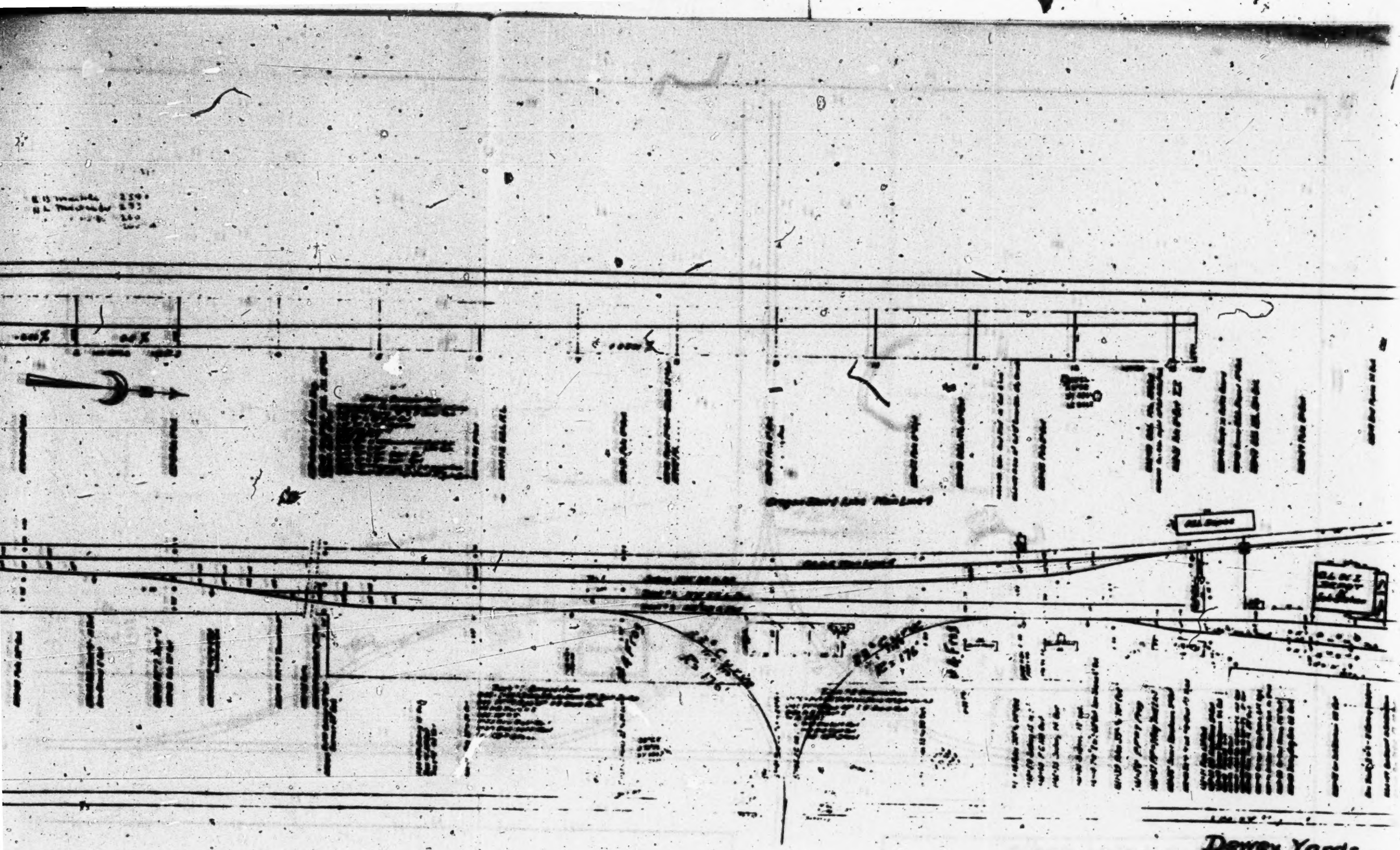
385' HB to End

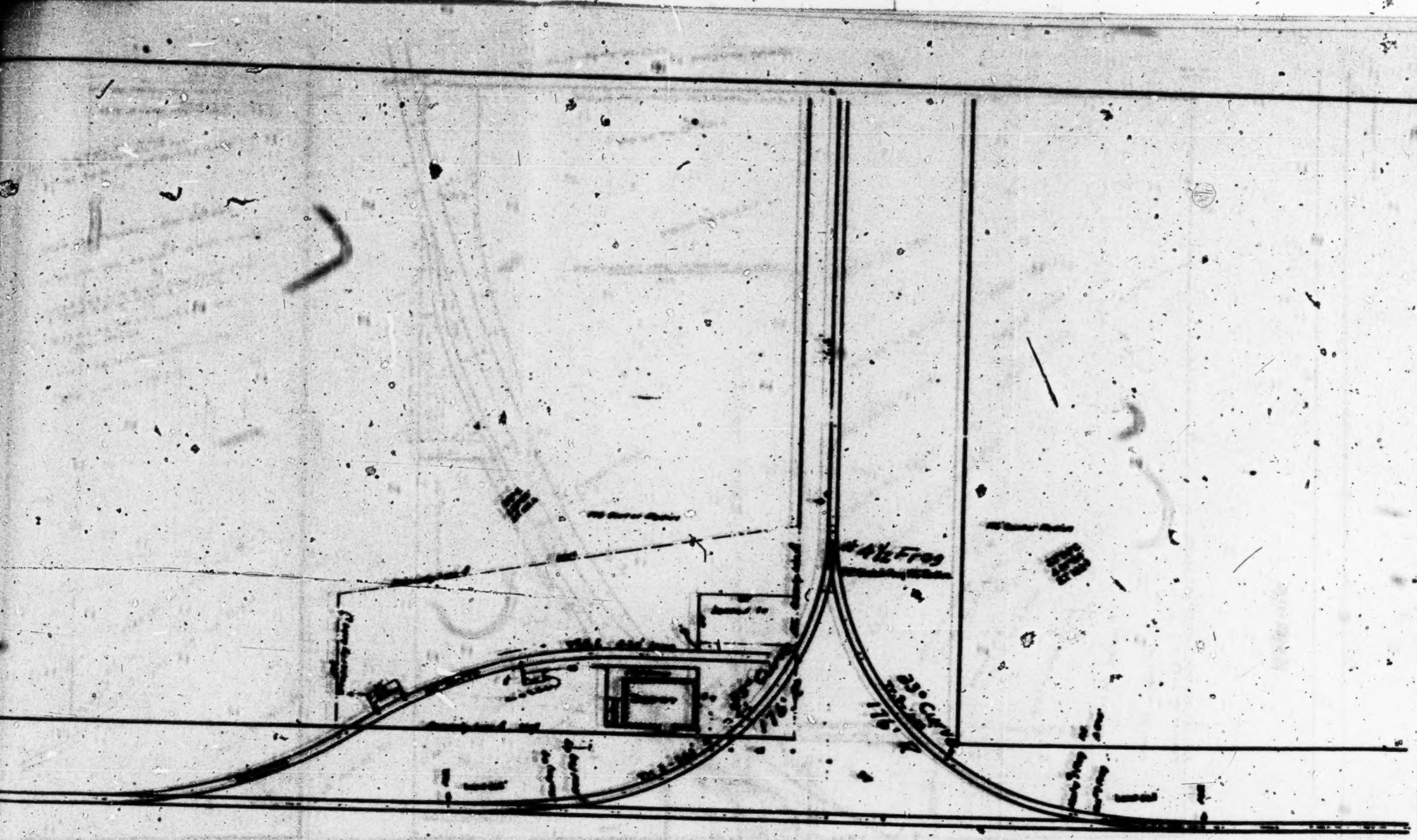
Th 6

Th 7

Th 8

Brigham yards


Dewey Yards



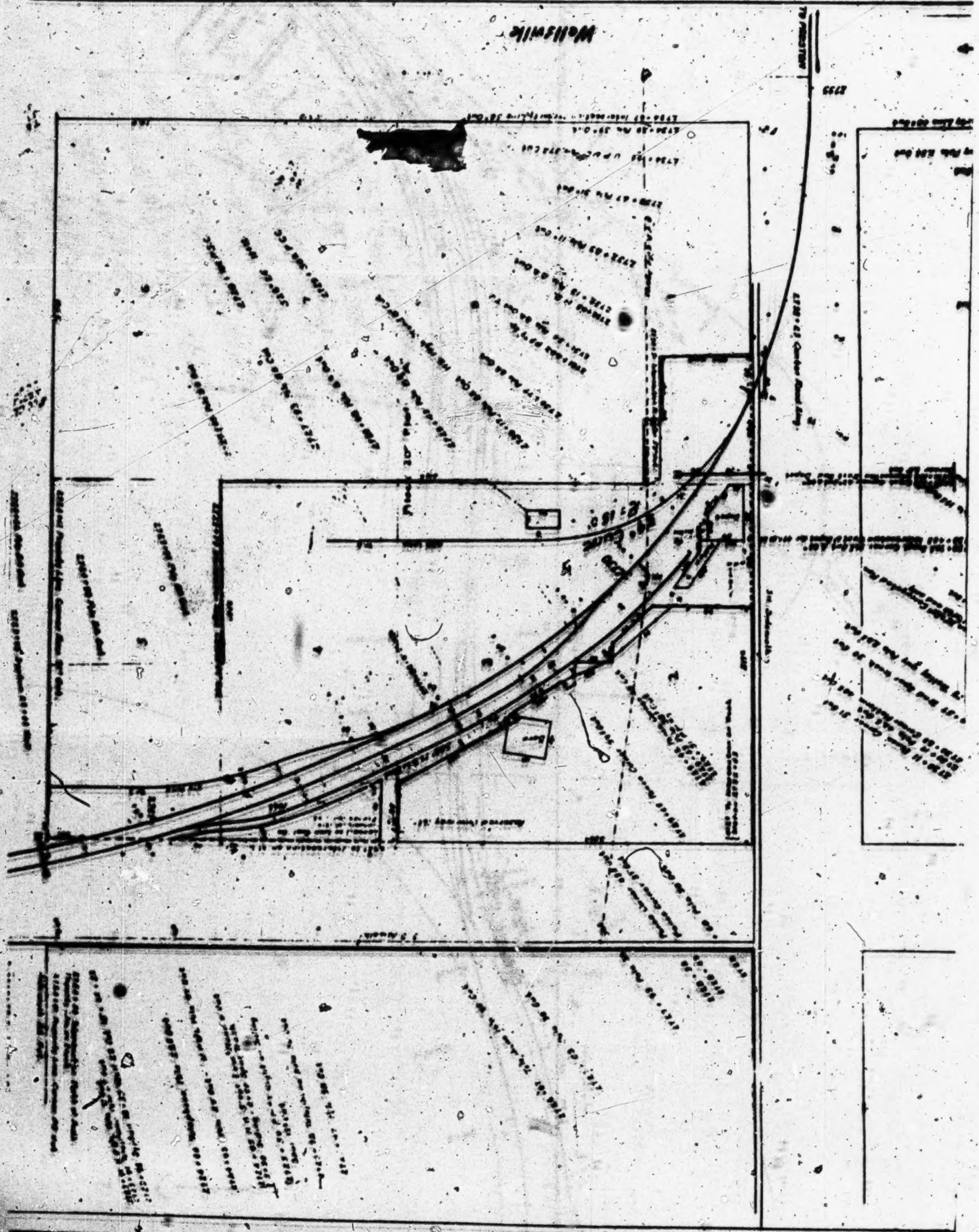
OGDEN LOGAN & IDAHO RY. CO.

Plot Showing

DEPOT, SPUR AND WYE

AT

BRENDON, UTAH.



T 11 N. R 1 E. SLM.

T 10 N

STREET

OGDEN LOGAN & IDAHO R.R.

PLAT OF

GENERAL FREIGHT INTERCHANGE

AT

HYRUM — UTAH

OGDEN LOGAN & IDAHO RY.

PROVIDENCE, UTAH

103

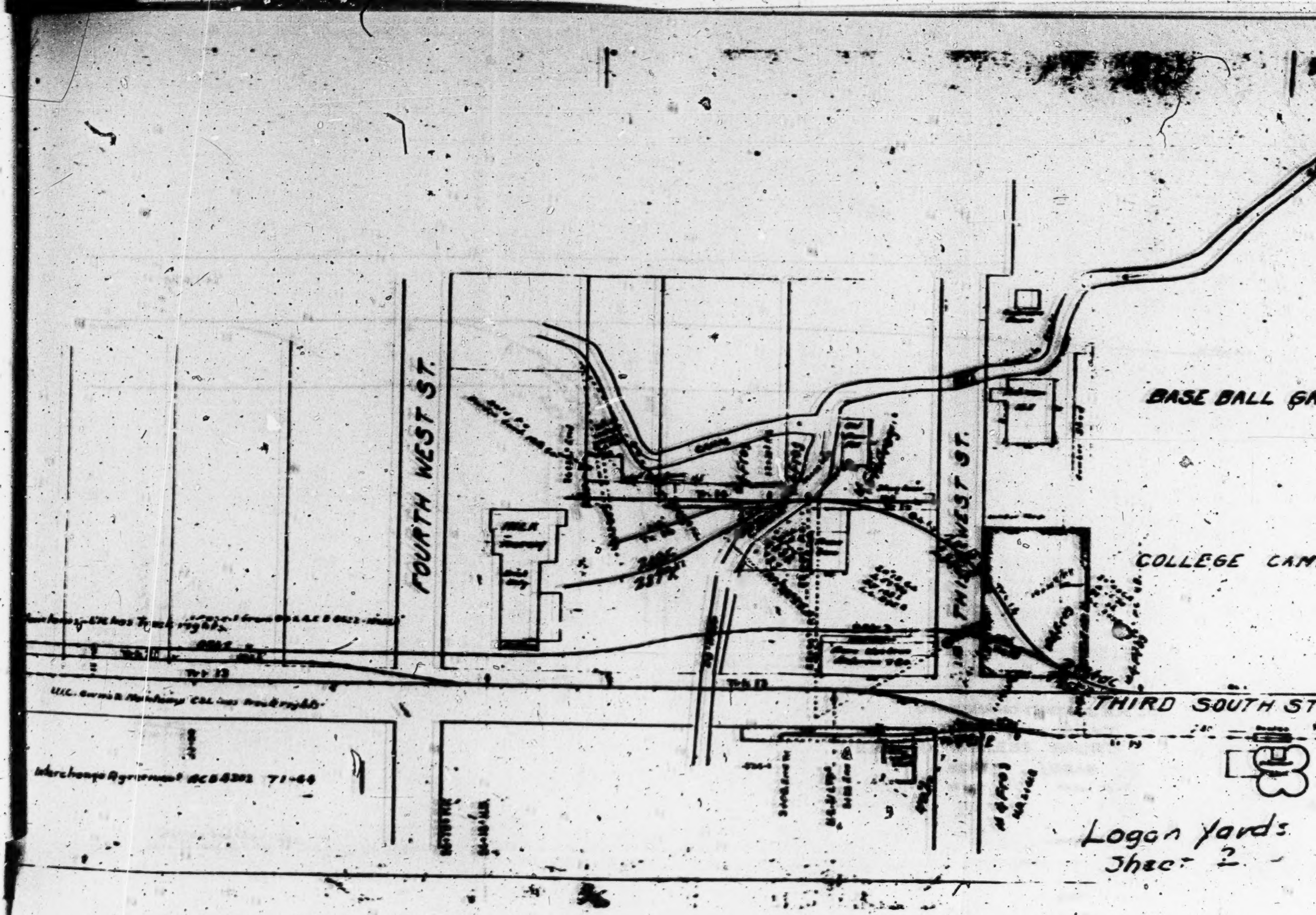
SECOND SOUTH ST.

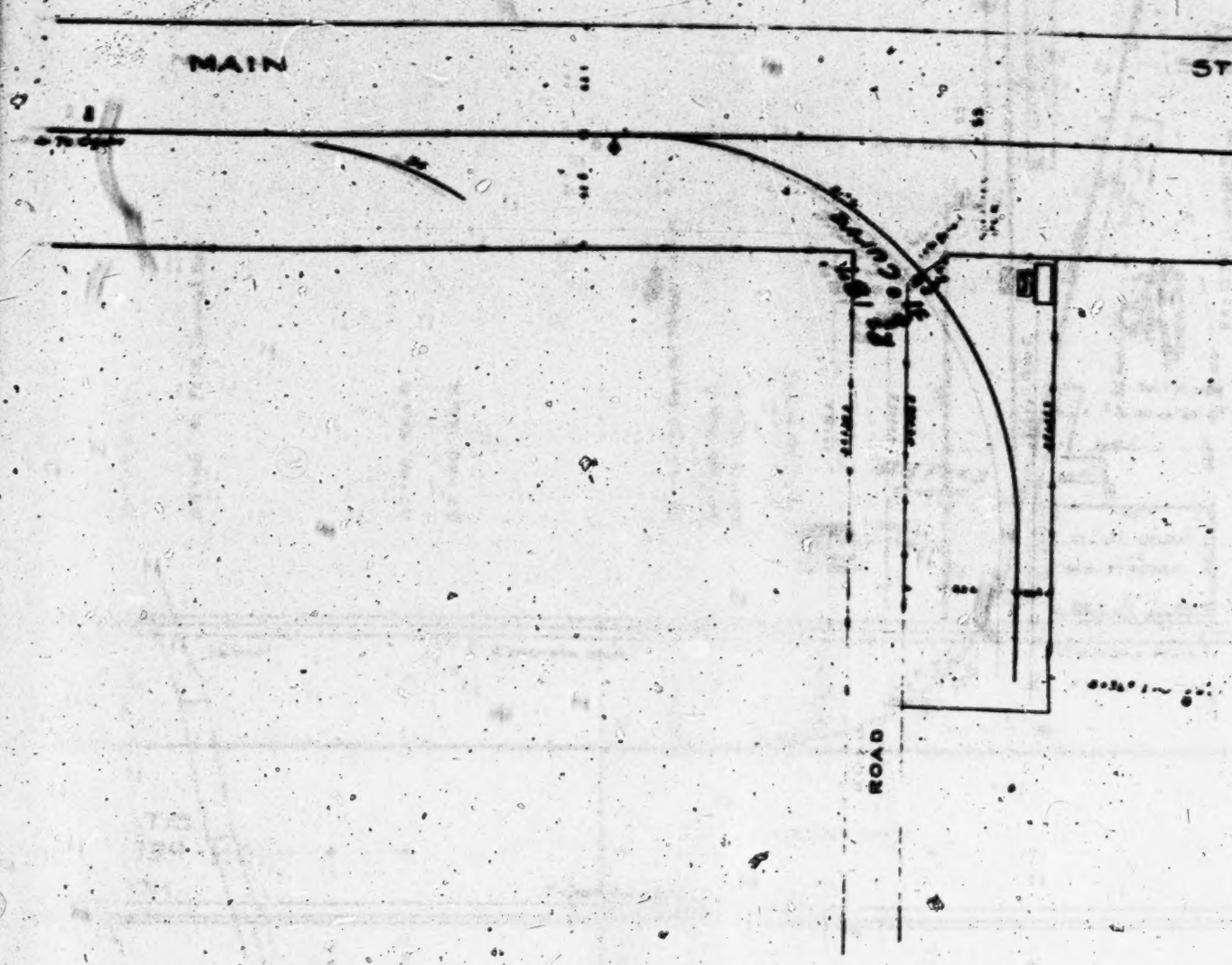
FIRST WEST ST.

MAIN STREET

POND

OGDEN LOGAN & IDAHO RY. CO.
FREIGHT YARDS ~ INTERCHANGE WITH
OREGON SHORT LINE R.R. Co. of LOGAN UTAH

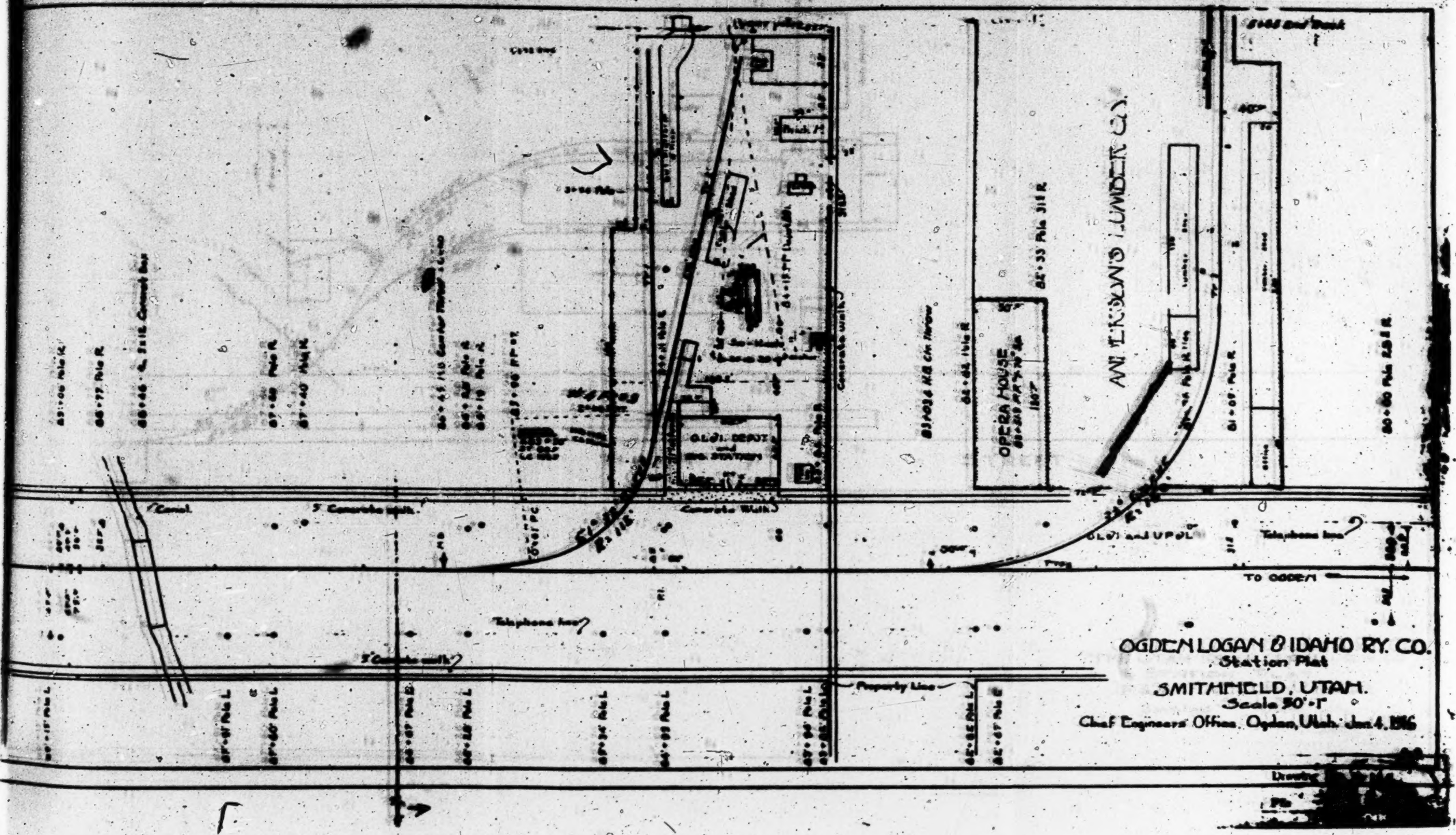

FOURTH WEST ST.
THIRD WEST ST.
BASE BALL GR
COLLEGE CAM
THIRD SOUTH ST
Interchange Agreement ACS 6301 71-64
Logan Yards
Sheet 2

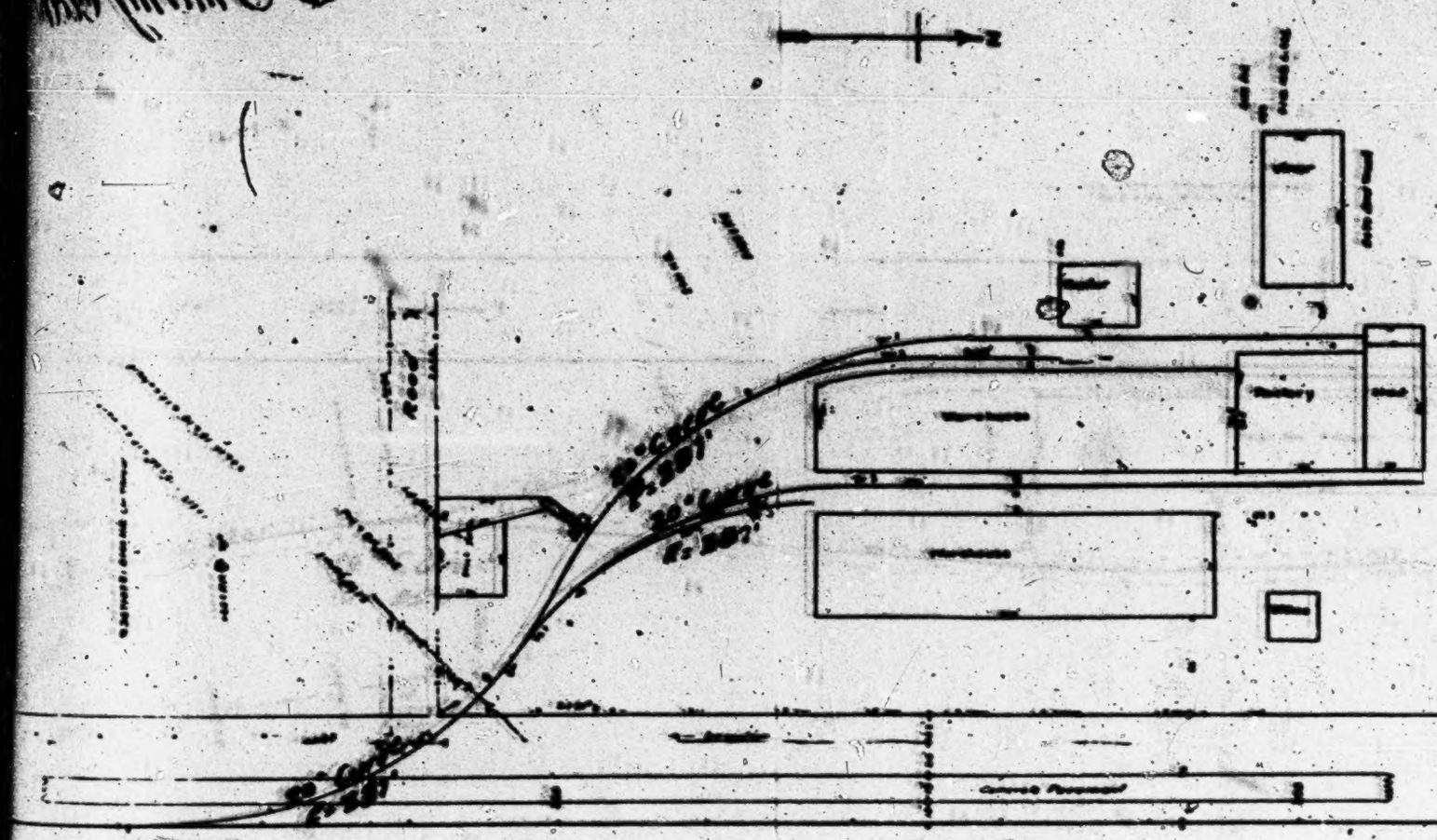


Spur Relocated in 1936
Spur to Long Road Mills Sawtelle and Wheeler Harness Co.

UTAH IDAHO CENTRAL R.R. CO.
STATION PLAT
VERNON-PEERLESS SPURS
NORTH LOGAN
MARCH 1937 SCALE 50 FT

610'
4 M 604


OPERA HOUSE
TO OGDEN
Telephone line
Property Line
Concrete Walk
Canal
OGDEN LOGAN & IDAHO RY. CO.
Station Plat
SMITHFIELD, UTAH.
Scale 50'-1"
Chief Engineers' Office, Ogden, Utah, Jan 4, 1916



THE UTAH IDAHO CENTRAL R.R. CO.
STATION PLAT
PEA FACTORY SPUR
Smithfield Utah
March 1927 Scale 50=1'

671
2M 26-2

N° Curve
R = 359'

Block 51 Plat A
Richmond Farm Survey

Lot 1

Lot 8

UTAH IDAHO CENTRAL RR CO.
RICHMOND MILK SPUR
March 1931 Scale 50'-1"

Sheet 1

632
4180-B

30

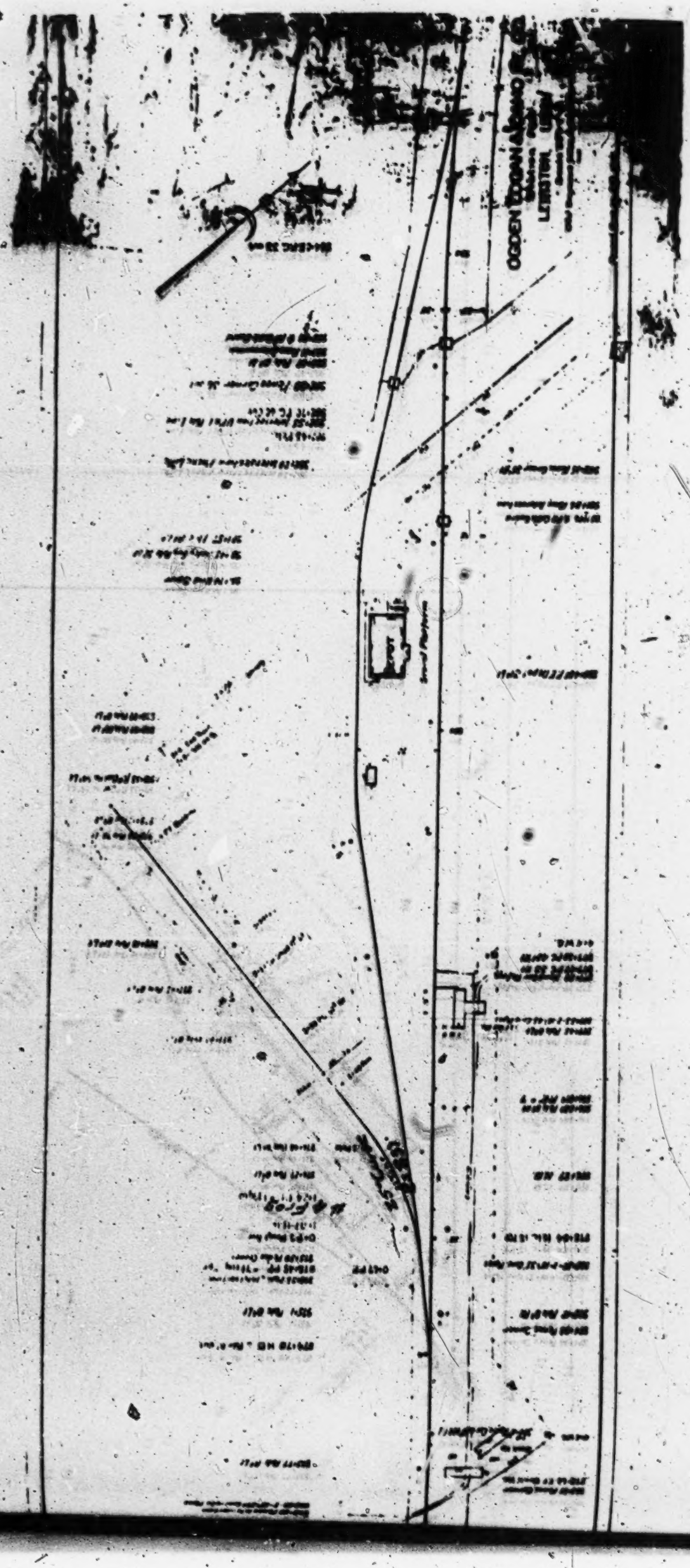
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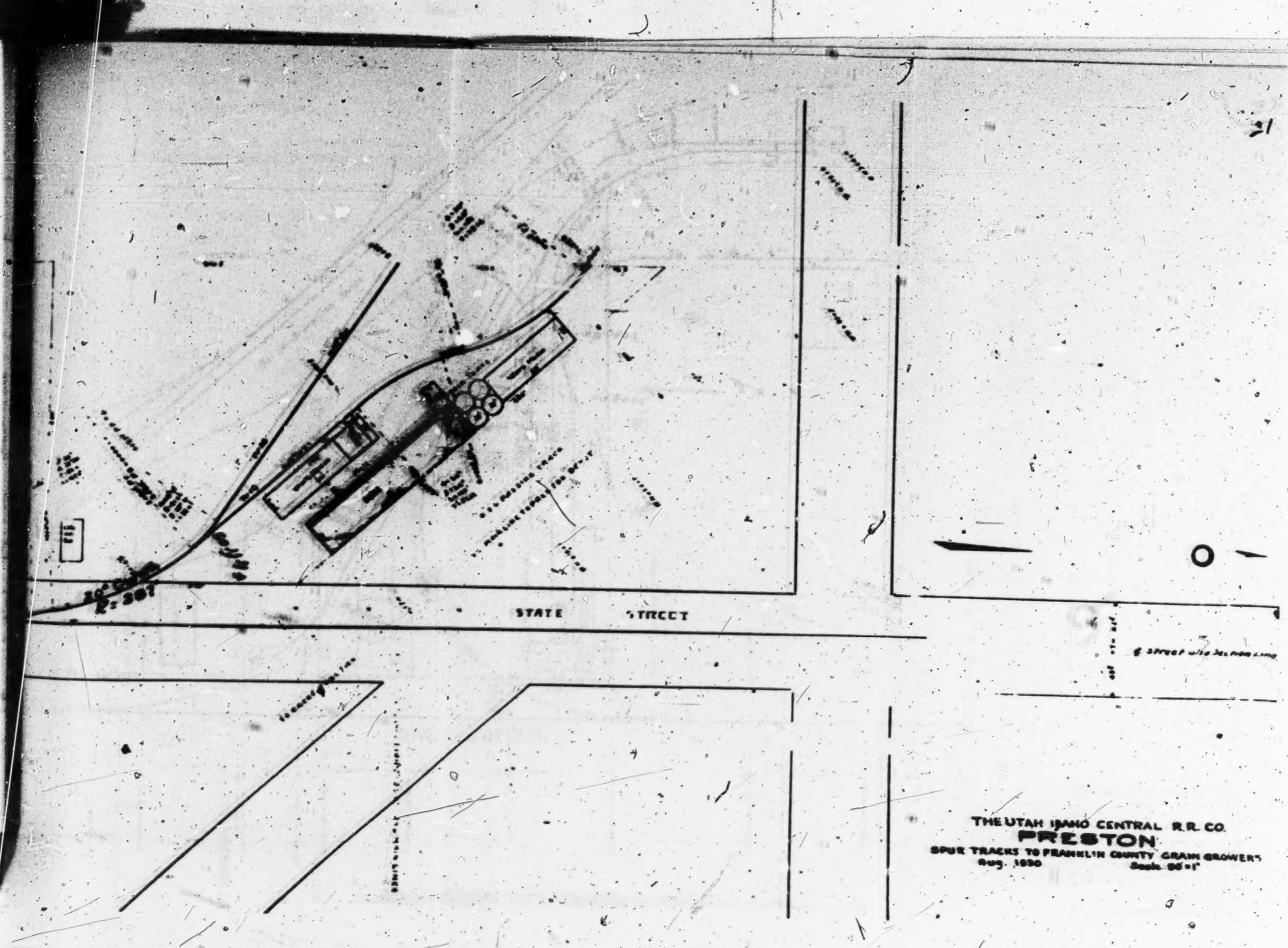
Lot 5 Block 47 Richmond Farm

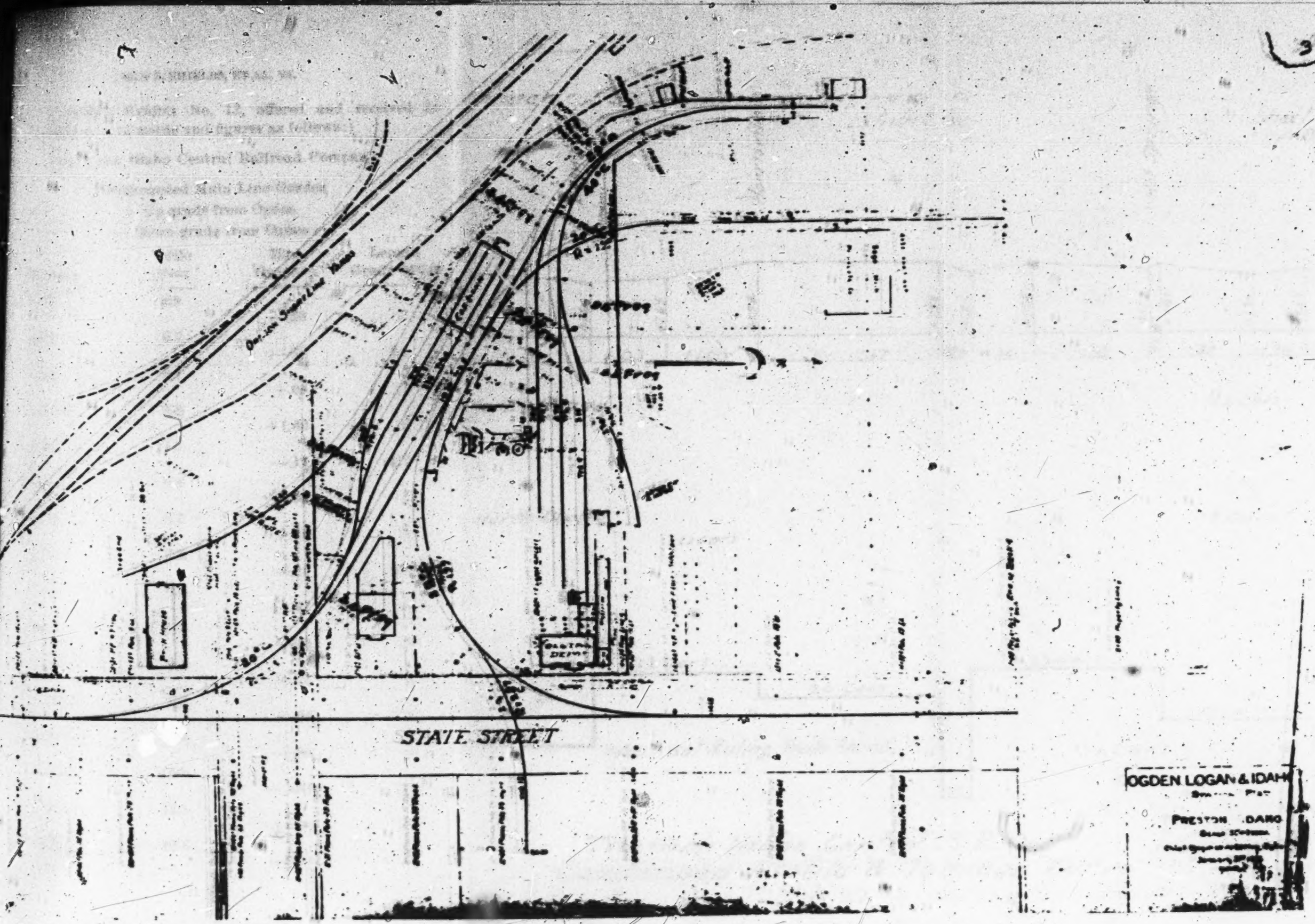
South

Richmond Hill for
Sheet 2

Lot 2 Block 50 Richmond Farm Survey




STATE STREET
THE UTAH IDAHO CENTRAL R.R. CO.
PRESTON
SPUR TRACKS TO FRANKLIN COUNTY GRAIN GROWERS
Aug. 1930
Scale 50'=1"


STATE STREET
OGDEN LOGAN & IDAH
PRESTON DARO

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346 (Plaintiff's Exhibit No. 13, offered and received in evidence, is in words and figures as follows:)

"The Utah Idaho Central Railroad Company

"Pronounced Main Line Grades

+ Up grade from Ogden

— Down grade from Ogden

Elevation	Mile Post	Max. Grade %	Length Grade Miles
4,302	0.0		
		—.20	.7
4,299	0.7		
		—.58	2.4
4,264	3.1		
		+.03	.7
4,265.05	3.8		
		+1.00	.9
4,298	4.7		
		—.17	1.7
4,288	6.4		
		—.93	.3
4,275	6.7		
		+.42	.6
4,285	7.3		
		—.20	1.1
4,275	8.4		
		+1.67	.1
4,280	8.5		
		—.40	.9
4,255.75	9.4		
		+.36	.5
4,263.66	9.9		
		—.60	.4
4,252.82	10.3		
		+.80	.3
4,256.58	10.6		
		—1.50	1.5
4,203.76	12.1		
		+1.90	1.7
4,306.08	13.8		
		—1.25	1.7

Ex. 13 438

Elevation	Mile Post	Max. Grade %	Length Grade Miles
4,248.76	15.5		
		+1.67	1.2
4,320.88	16.7		
		—2.00	.9
4,271.88	17.6		
		—.50	1.1
4,254.88	18.7		
		+2.00	1.7
4,374.41	20.4		
		—1.83	2.9
4,221.26	23.3		
		+.50	.9
4,228.02	24.2		
		—1.20	.6
4,216.20	24.8		
		+.58	11.8
4,324.36	36.6		
		+2.00	4.6
4,701.65	41.2		
		—.20	.1
4,700.45	41.3		
		+1.81	3.6
4,961.16	44.9		
		—2.00	5.5
4,470.76	50.4		
		+.72	.5
4,486.12	50.9		
		—.67	.1
	"(2)		
4,483.22	51.0		
		+1.67	.3
4,498.01	51.3		
		—1.10	.5
4,477.13	51.8		
		—.54	1.6
4,470.05	53.4		
		+1.14	.8
4,511.05	54.2		
		—.02	.9

Ex. 13

Elevation	Mile Post	Max. Grade %	Length Grade Mile
4,510.09	55.1		
		+1.41	.3
4,528.95	55.4		
		—1.40	.2
4,522.42	55.6		
		+.84	.4
4,537.32	56.0		
		—1.40	1.1
4,488.12	57.1		
		+2.00	3.0
4,655.51	60.1		
		0.0	.2
4,655.51	60.3		
		—1.98	.8
4,611.67	61.1		
		—.60	1.1
4,608.73	62.2		
		—.90	1.4
4,551.35	63.6		
		+1.34	.6
4,575.99	64.2		
		—1.14	2.7
4,506.00	66.9		
		+.26	.6
4,517.00	67.5		
		+4.77	.1
4,535.00	67.6		
		—.44	4.6
4,495.00	72.2		
		+1.50	.3
4,515.00	72.5		
		+.40	1.5
4,526.00	74.00		
		+1.80	1.0
4,605.00	75.00		
		—.72	.5

Ex. 13 440

Elevation	Mile Post	Max. Grade %	Length Grade Miles
4,593.20	75.50		
		+1.59	.6
4,614.98	76.1		
		—.30	1.1
4,601.55	77.2		
		—2.00	1.3
4,527.71	78.5		
		+1.75	2.0
4,594.25	80.5		
		—1.50	.3
4,581.50	80.8		
		+.85	.5
4,607.25	81.5		
		—2.00	.6
4,552.70	81.9		
		+.90	.8
4,654.05	82.7		
		—1.38	.3
4,564.05	82.7		
		—1.38	.3
4,558.16	83.3		
		—2.00	1.3
4,467.18	84.6		
		+1.89	.5
4,503.00	85.1		
		+.40	3.8
	"(3)		
4,515.90	88.9		
		—1.18	.4
4,495.75	89.3		
		+.41	1.7
4,517.81	91.0		
		+.20	3.0
4,703.11	94.0		
		+.4	.7
4,705.8	94.7		

Ex. 14

348½ (Plaintiff's Exhibit 14, offered and received in evid
is in words and figures as follows:)

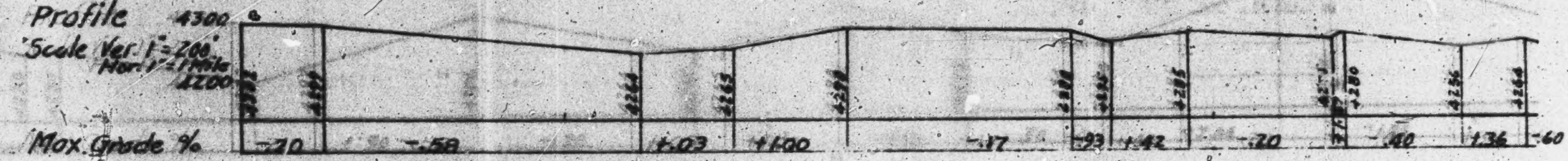
Exhibit #14

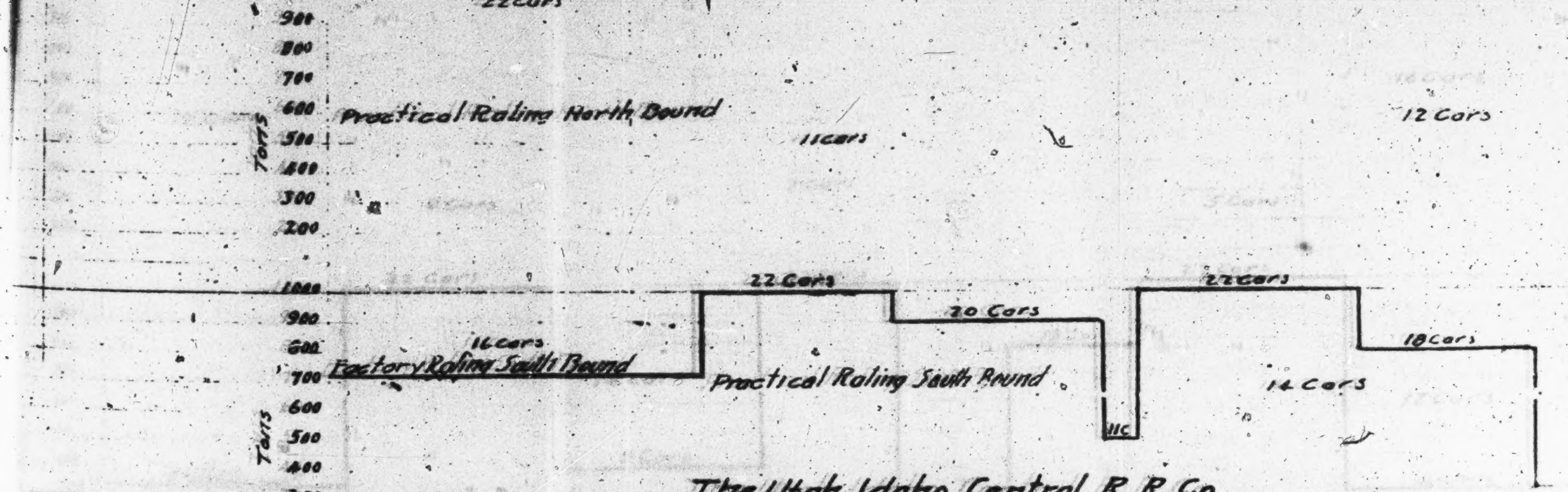
Before the Interstate Commerce Commission

Exhibit #14

The Utah Idaho Central Railroad Company Coude
Profile and Locomotive Tonnage Curve.

Before the Interstate Commerce Commission Railway Service
Docket No 2 Exhibit No. Sheet 1 of 8





The Utah-Idaho Central R.R. Co.
Condensed Profile & Tonnage Curve

Note: Tonnage Curve shows Technical Factory Rating and Practical Operating Rating

Street
2 of 8

Nervo

Willard

Perry

Ohio

Brigham

22 Cars

22 Cars

22 Cars

22 Cars

12 Cars

6 Cars

7 Cars

5 Cars

14 Cars

22 Cars

22 Cars

22 Cars

22 Cars

8 Cars

14 Cars

9 Cars

5 Cars

10 Cars

12 Cars

6 Cars

11 12 13 14 15 16 17 18 19 20 21 22

Sheet 3 of 8

Jamestown

Calls Ford

Hardyville

Madden

22 Cars

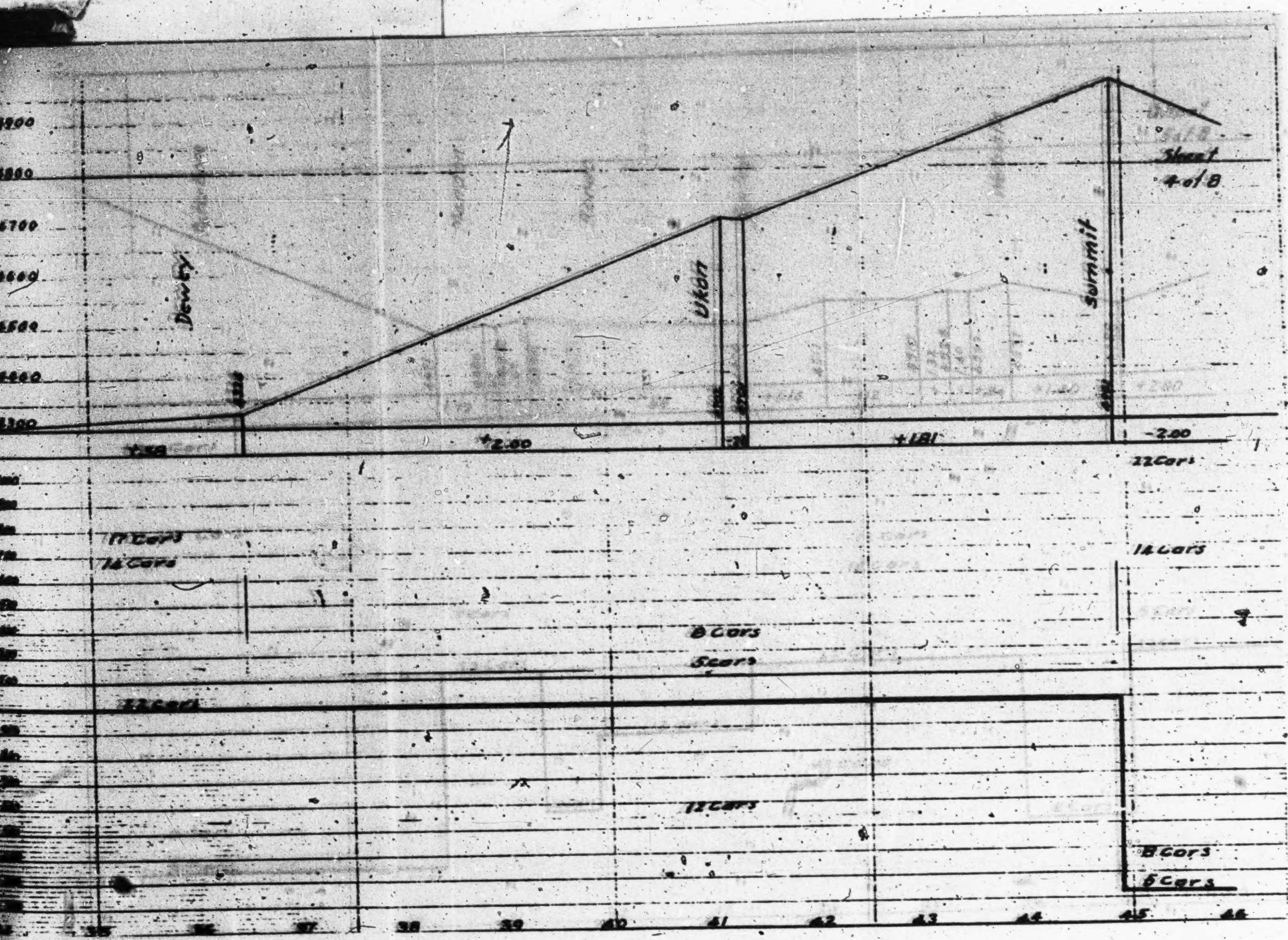
17 Cars

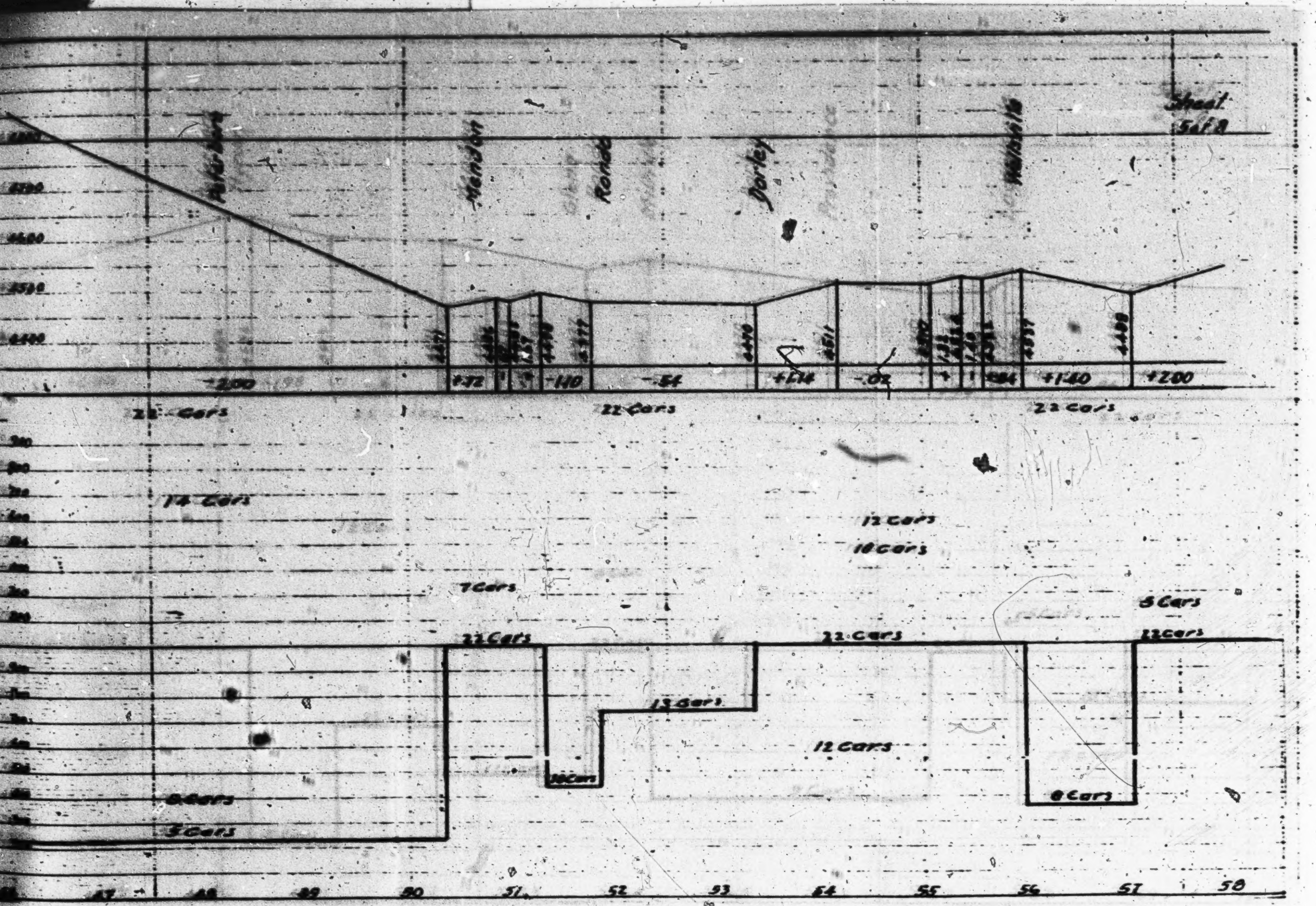
14 Cars

22 Cars

18 Cars

6 Cars


Dawley
Ukon
Summit
Sheet 4 of 8
+1.58
+2.00
+1.81
-2.00
22 Cors
11 Cors
14 Cors
8 Cors
5 Cors
22 Cors
12 Cors
8 Cors
6 Cors
35
36
37
38
39
40
41
42
43
44
45
46


Sheet 5 of 8
-2.00
+.72
-1.10
-.54
+1.14
-.02
+.84
+1.40
+2.00
22 Cars
22 Cars
22 Cars
14 Cars
12 Cars
10 Cars
7 Cars
5 Cars
22 Cars
22 Cars
22 Cars
13 Cars
12 Cars
10 Cars
8 Cars
8 Cars
3 Cars
47
48
49
50
51
52
53
54
55
56
57
58

Sheet 6 of 8

Hyram

Glam

Millville

Providence

Logan

+200 -198 -60 -90 +134 -1.14 -136 -144

23 Cars

23 Cars

13 Cars

5 Cars

9 Cars

23 Cars

11 Cars

11 Cars

22 Cars

23 Cars

23 Cars

5 Cars

18 Cars

12 Cars

12 Cars

9 Cars

58 59 60 61 62 63 64 65 66 67 68 69 70

Sheet 7 of 8

Greenville | Tarleton | Hyde Park | Smithfield | Mack | Richmond

4600 4400

4526 4620 4591 4615 4602 4514 4592 4607 4521

-44 +.60 +1.80 -.72 +1.69 -.30 -2.00 +1.75 -1.50 +1.85 -2.00 1.90

22 Cars 19 Cars 22 Cars

12 Cars 14 Cars

8C 6 Cars 6 Cars

22 Cars 22 Cars

18 Cars 19 Cars

12 Cars 12C

5 Cars 5 Cars

70 71 72 73 74 75 76 77 78 79 80 81 82

Sheet
2 of 8

Harrills

Sugarhill

Lawnside

Fairview

Rockstead

Prospect

4600

4.726 4.626 4.554 4.467 4.398 4.516 4.436 4.411 4.703 4.704

-2.00 +1.80 +1.40 -1.10 +1.41 +2.00 +1.40

22 Cars

19 Cars

15 Cars

18 Cars

12 Cars

6 Cars
5 Cars

22 Cars

12 Cars

B2 B6 B5 B6 B7 B8 B9 B10 B1 B2 B3 B4

(Plaintiff's Exhibit No. 15, offered and received in evidence, is in words and figures as follows:)

Number of Passenger Trains, Passenger Buses and Freight Trains Operated Over the Utah Idaho Central Railroad—Years 1933, 1934, 1935 and the Average Number Operated Daily.

	1932			Daily Average			1933			Daily Average			1934			Daily Average			1935			Daily Average		
	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.	Pagr. Trns.	Pagr. Buses	Frt. Trns.
January	330	121	180	10.6	3.9	5.8	424	120	176	13.7	3.9	5.7	370	122	179	11.9	3.9	5.8	338	131	206	10.9	4.2	6.6
February	312	114	200	10.8	3.9	6.9	332	152	237	11.9	5.4	8.5	325	113	139	11.6	4.0	5.0	295	118	174	10.5	4.2	6.2
March	331	127	192	10.7	4.1	6.2	456	128	206	14.7	4.1	6.6	370	130	136	11.9	4.2	4.4	329	128	219	10.6	4.1	7.1
April	315	130	146	10.5	4.3	4.9	431	120	235	14.4	4.0	7.8	361	120	140	12.0	4.0	4.7	324	127	188	10.8	4.2	6.3
May	274	125	113	8.8	4.0	3.6	408	142	223	13.2	4.6	7.2	345	125	148	11.1	4.0	4.8	320	128	139	10.3	4.1	4.5
June	292	121	116	9.7	4.0	3.9	206	240	247	6.9	8.0	8.2	330	120	208	11.0	4.0	6.9	225	122	158	7.5	4.1	5.3
July	250	126	145	8.1	4.1	4.7	221	256	199	7.1	8.3	6.4	332	126	220	10.7	4.1	7.1	226	130	247	7.3	4.2	8.0
August	242	135	180	7.8	4.4	5.8	213	250	313	6.9	8.1	10.0	346	128	323	11.2	4.1	10.4	213	128	260	6.9	4.1	8.4
September	270	122	251	9.0	4.1	8.4	234	228	428	7.8	7.6	14.2	346	133	260	11.5	4.4	8.7	297	123	321	9.9	4.1	10.7
October	299	124	349	9.7	4.0	11.3	365	137	401	11.7	4.4	12.9	358	133	454	11.5	4.3	14.7	316	133	398	10.2	4.3	12.8
November	314	122	251	10.4	4.1	8.4	348	127	375	11.6	4.2	12.5	349	129	328	11.6	4.3	10.9	313	125	349	10.4	4.2	11.6
December	326	124	284	10.5	4.0	9.2	359	131	266	11.6	4.2	8.6	364	133	284	11.7	4.3	9.2	321	137	190	10.4	4.4	6.1
Total	3555	1491	2407				3997	2031	3306				4196	1512	2819				3517	1530	2849			
Average daily trains operated over a period of 12 months				9.7	4.1	6.6				11.0	5.6	9.1				11.5	4.1	7.7				9.6	4.2	7.8

Distance From Ogden Miles		Distance from Preceding Station Miles		Population Town and Cities
35	Pioneer	F	½	
36	Dewey		1	275
38	Beaton	F	2	
40	Collinston	F	2	
		"(2)		
41	Ukon	F	1	
43	Beaver Dam	F	2	
45	Summit	F	2	
45½	Kidman	F	½	
46	Farrell	F	½	
48	Petersboro	F	1	
51	Mendon	F	3	434
52	Rondo	F	1	
53	Darley	F	1	
56	Wellsville		3	1271
59	Hills	F	3	
60	West Hyrum	F	1	
61	Hyrum		1	1869
63	Anderson	F	2	
64	Millville		1	403
64½	Humphries	F	½	
66	Providence		1½	1088
67	South Logan	F	1	
68	Logan		1	9979
69	Logan 2nd North	F	1	
70	Greenville	F	1	
73	Hyde Park	F	3	723
74	South Smithfield	F	1	
75	Smithfield		1	2353
75½	Smithfield 4th No.	F	½	

352 (Plaintiff's Exhibit No. 16, offered and received in evidence, is in words and figures as follows:)

"Passenger stations on The Utah Idaho Central Railroad Company showing mileage from Ogden—Mileage as between stations and population of towns and Cities.

Distance From Ogden Miles		Distance from Preceding Station Miles		Population Town and Cities
0	Ogden Station			40272
1	Ogden 12th Street		1	
2	Broom	F	1	
3	Browning	F	1	
5	Harrisville	F	½	
7	Midway	F	2	
8	View	F	1	
8½	Clayton	F	½	
9	Hot Springs	F	½	
11	Nerva	F	2	
14	Willard		3	561
16	Wood	F	2	
17	South Perry	F	1	
17½	Perry	F	½	
18	Davis	F	½	
20	South Brigham	F	2	
21	Brigham		1	5093
22	North Brigham	F	1	
24	Bristol	F	2	
28	Harper	F	3	
29	Calls Fort	F	2	
31	Honeyville		2	494
32	Crystal Springs	F	1	
33	Madsen	F	1	
34½	Hunsaker	F	1½	

Distance From Ogden Miles			Distance from Preceding Station Miles	Population Town and Cities
78	Mack	F	2½	
79	Carsons	F	1	
80	Emepy	F	1	
80½	North Cache High	F	½	
81	Richmond		½	1140
82	Burt	F	1½	
83	Merrills		½	
85	Sugarton	F	2	
87	Lewiston		2	1783
87½	Idaline	F	½	
89	Fairview	F	1½	
92	Whitney	F	3	
93	Beckstead	F	1	
95	Preston		2	3381
	Plain City Branch			
5	Harrisville	F	2	
7	Farr West	F	2	
9	Poplar	F	2	
10	Plain City		1	806
12	Warren		2	293

"Note 1:—"F" Denotes Flag Stops

" 2:—Distance shown to nearest Mile.

"73 Passenger Stops M 107 Miles of Road"

(Plaintiff's Exhibit No. 17, offered and received in evidence, is in words and figures as follows:)

"Statement of Passengers handled by The Utah Idaho Central Railroad Company—Amount of Passenger, Revenue and average fare per passenger years 1931-1932-1933-1934-1935.

Year	1931	1932	1933	1934	1935
Passengers handled	489,650	407,507	366,442	408,634	400,240
Passenger Revenue	$89,632.57	$67,410.45	$61,420.99	$61,346.25	$64,447.15
Average fare per passenger	18.3c	16.5c	16.8c	14.0c	16.1c"

(Plaintiff's Exhibit No. 18, offered and received in evidence, is in words and figures as follows:)

356 "Statement of Passengers Handled by The Utah Idaho Central Railroad Company—as between regular passengers and school students for the years 1931, 1932, 1933, 1934 & 1935.

Year	1931	1932	1933	1934	1935
Regular Passengers	279,160	222,353	192,063	233,035	210,608
School Students	210,490	185,154	174,379	175,599	189,632
	489,650	407,507	366,442	408,634	400,240"

Exhibit 19 (Abstracted)

357 The capacity of sidings (based upon 50 ft. per car) on various steam railroads operating out of Utah for approximately 200 miles from Utah Terminal as reflected by their official time tables is shown by the following table:

Name of Railroad	Average Car Capacity	Maximum Car Capacity	Minimum Car Capacity	Comment
Salt Lake & Los Angeles	87	150	6	3 out of 42 sidings have capacity of less than 63 cars
Southern Pacific	114	225	10	3 out of 41 sidings have capacity of less than 51 cars
Oregon Short Line	86	228	23	2 out of 40 sidings have capacity of less than 54 cars
Union Pacific	109	318	32	1 out of 34 sidings have capacity of less than 52 cars
Denver & Rio Grande Western	86	121	20	2 out of 35 sidings have capacity of less than 59 cars

(Plaintiff's Exhibit No. 20, offered and received in evidence, is in words and figures as follows:)

"Selected Operating Statistics of Steam Railroads Connecting With the Utah Idaho Central Railroad, Also Same Information for that Company, Designed to Show the Relative Size of Train and Also the Labor Cost Per Car Mile for Enginemen and Trainmen.

	Union Pacific Railroad				
	1931	1932	1933	1934	1935
Freight Train Miles	9,855,627	8,309,123	7,776,668	9,469,762	10,301,087
Freight Car Miles	644,153,521	522,799,614	502,271,910	596,712,012	621,146,351
Wages Enginemen & Train, Freight	$4,093,150.15	$3,089,245.70	$2,806,236.65	$3,374,874.03	$4,010,9[illegible]8.00
Freight Car Miles per Train Mile	65.4	62.9	64.6	63.0	60.3
Cost Enginemen & Trainmen per car mile, Freight	.64c	.59c	.56c	.57c	.65c
Passenger Train Miles	8,654,405	6,582,035	4,667,849	5,169,524	6,282,899
Passenger Car Miles	81,059,247	65,207,658	49,656,447	55,879,460	67,035,563
Wages Enginemen & Trainmen, Passenger	$2,546,783.41	$1,831,748.38	$1,315,846.89	$1,478,304.91	$1,916,198.00
Passenger Car Miles per Train Mile	9.4	9.9	10.6	10.8	10.7
Cost of Enginemen & Trainmen per car mile, Passenger	3.14c	2.81c	2.65c	2.64c	2.86c

		Oregon Short Line Railroad			
Freight Train Miles	2,791,071	2,287,647	2,376,445	2,649,074	3,195,575
Freight Car Miles	141,787,335	106,925,867	113,762,118	130,813,098	153,445,370
Wages Enginemen & Trainmen, Freight	$1,361,557.16	$1,044,837.68	$1,105,683.68	$1,200,160.19	$1,548,847.00
Freight Car Miles per train Mile	50.8	46.7	47.9	49.4	48.0
Cost of Enginemen & Trainmen per car mile, Freight	.96c	.98c	.97c	.92c	1.01c
Passenger Train Miles	2,573,865	2,151,307	1,805,750	1,805,750	1,940,954
Passenger Car Miles	19,118,720	15,679,201	12,885,936	13,531,729	16,714,927
Wages Trainmen & Enginemen, Passenger	$760,911.24	$581,932.88	$[illegible],944.88	$506,218.17	$627,548.00
Passenger Car Miles per Train Mile	7.4	7.3	7.1	7.7	8.6
Cost of Enginemen & Trainmen per Passenger, Car Mile	3.98c	3.71c	3.94c	3.74c	3.75c

Los Angeles Salt Lake Railroad

	1931	1932	1933	1934	1935
Freight Train Miles	1,904,326	1,722,495	1,659,589	1,825,467	1,870,959
Freight Car Miles	89,759,842	78,009,337	73,898,950	87,568,288	90,413,606
Wages Enginemen & Trainmen, Freight	$1,089,722.00	$898,778.85	$842,968.83	$980,740.24	$1,090,670.00
Freight Car Miles per Train Mile	47.1	45.3	44.5	48.0	48.3
Cost of Enginemen & Trainmen per Car Mile, Freight	1.21c	1.15c	1.14c	1.12c	1.21c
Passenger Train Miles	1,978,605	1,783,448	1,262,793	1,224,801	1,562,232
Passenger Car Miles	19,929,630	18,039,699	12,372,147	13,448,610	16,662,751
Wages Enginemen & Trainmen, Passenger	$651,668.20	$538,869.78	$382,094.97	$380,911.79	$537,086.00
Passenger Car Miles per Train Mile	10.1	10.1	9.8	11.0	10.7
Wages of Enginemen & Trainmen per Car, Mile Psngr.	3.27c	2.98c	3.09c	2.88c	3.22c

Southern Pacific Company

Freight Train Miles	13,100,586	11,351,367	10,489,421	12,084,100	13,202,755
Freight Car Miles	714,692,159	600,579,575	568,910,411	678,325,266	747,046,856
Wages Enginemen & Trainmen, Freight	$8,231,907.30	$6,171,938.68	$5,680,595.06	$6,963,905.99	$8,084,150.00
Freight Car Miles per Train mile	54.6	52.9	54.2	56.1	56.6
Cost of Enginemen & Trainmen per car Mile, Freight	1.15c	1.03c	1.0c	1.03c	1.08c
Passenger Train Miles	14,647,892	12,057,287	10,337,537	10,810,580	11,370,473
Passenger Car Miles	138,925,149	113,796,202	97,075,384	108,174,016	116,853,430
Wages Enginemen & Trainmen, Passenger	$4,907,315.22	$3,720,376.18	$3,161,475.11	$3,392,286.14	$3,881,916.00
Passenger Car Miles per Train Mile	9.5	9.4	9.4	10.0	10.3
Cost Enginemen & Trainmen per car mile, Pssgr.	3.53c	3.27c	3.26c	3.14c	3.32c

(Denver & Rio Grande R. R.)

	1931	1932	1933	1934	1935
Freight Train Miles	2,593,844	2,196,516	2,244,221	2,726,435	2,904,163
Freight Car Miles	125,165,936	104,438,476	109,089,678	123,098,542	123,042,105
Wages of Enginemen & Trainmen, Freight	$1,460,434.00	$1,105,721.22	$1,128,056.00	$1,357,836.68	$1,572,955.00
Freight car Miles per Train Mile	48.2	47.5	48.6	45.1	42.4
Cost Enginemen & Train men per Car Mile, Freight	1.17c	1.06c	1.03c	1.10c	1.28c
Passenger Train Miles	2,190,749	1,961,008	1,621,911	1,794,616	2,025,460
Passenger Car Miles	15,094,881	12,161,945	10,944,053	12,475,334	14,489,787
Wages Enginemen & Trainmen, Passenger	$617,907.44	$488,470.52	$406,618.77	$464,699.42	$563,933.00
Passenger car Miles per Train Mile	6.9	6.2	6.7	7.0	7.2
Cost of Enginemen & Trainmen per Car Mile, Passenger	4.09c	4.02c	3.72c	3.72c	3.89c

"(4)

"The Utah Idaho Central Railroad Company

Freight Train Miles	170,901	151,250	180,962	170,665	165,900
Freight Car Miles	999,985	946,868	1,018,209	1,064,334	1,083,650
Wages Enginemen & Trainmen, Freight	$30,979.79	$25,900.50	$27,975.64	$27,618.96	$27,077.71
Freight Car Miles per Train Mile	5.9	6.3	5.6	6.2	6.5
Cost of Enginemen & Trainmen per car mile, Freight	3.1c	2.74c	2.75c	2.59c	2.50c
Passenger Train Miles	278,930	259,505	228,041	204,023	199,045
Passenger Car Miles	359,866	298,868	253,224	225,808	223,216
Wages Enginemen & Trainmen, Passenger	$15,242.88	$14,071.54	$11,430.26	$11,538.74	$10,837.22
Passenger Car Miles per Train Mile	1.3	1.2	1.1	1.1	1.1
Cost Enginemen & Trainmen per car Miles, Pssgr.	4.24c	4.71c	4.51c	5.1c	4.9c

"Note—: These statistics include the direct mileage and cost allocation to passenger and freight
369 service obtained from reports on file with the Public Service Commission of Utah."

(Plaintiff's Exhibit No. 21, offered and received in evidence, is in words and figures as follows:)

"Comparison of Selected Operating Statistics on the Chicago, Milwaukee, St. Paul & Pacific Railroad, designed to show the relative size of train as between its Steam Operation and its Electrified Operation, for the years 1929-1931-1932-1933, and also for the year 1929 the relative labor cost for enginemen and trainmen per car mile as between its steam operation and its electrified operation.

461 Ex. 21 462

Steam Operation

	1929	1931	1932	1933
Freight Train Miles	19,682,830	15,219,067	12,838,943	12,570,230
Freight Car Miles	901,023,843	662,471,816	517,058,538	527,665,023
Wages Enginemen & Trainmen, Freight	$10,437,859.00			
Freight Car Miles per train mile	45.8	43.5	40.3	42.0
Cost of Enginemen & Trainmen per car mile, Freight	1.16c			
Passenger Train Miles	15,443,977	12,160,183	10,958,116	10,266,505
Passenger Car Miles	98,807,422	72,532,713	63,618,949	60,516,652
Wages Enginemen & Trainmen, Passenger	$4,521,131.00			

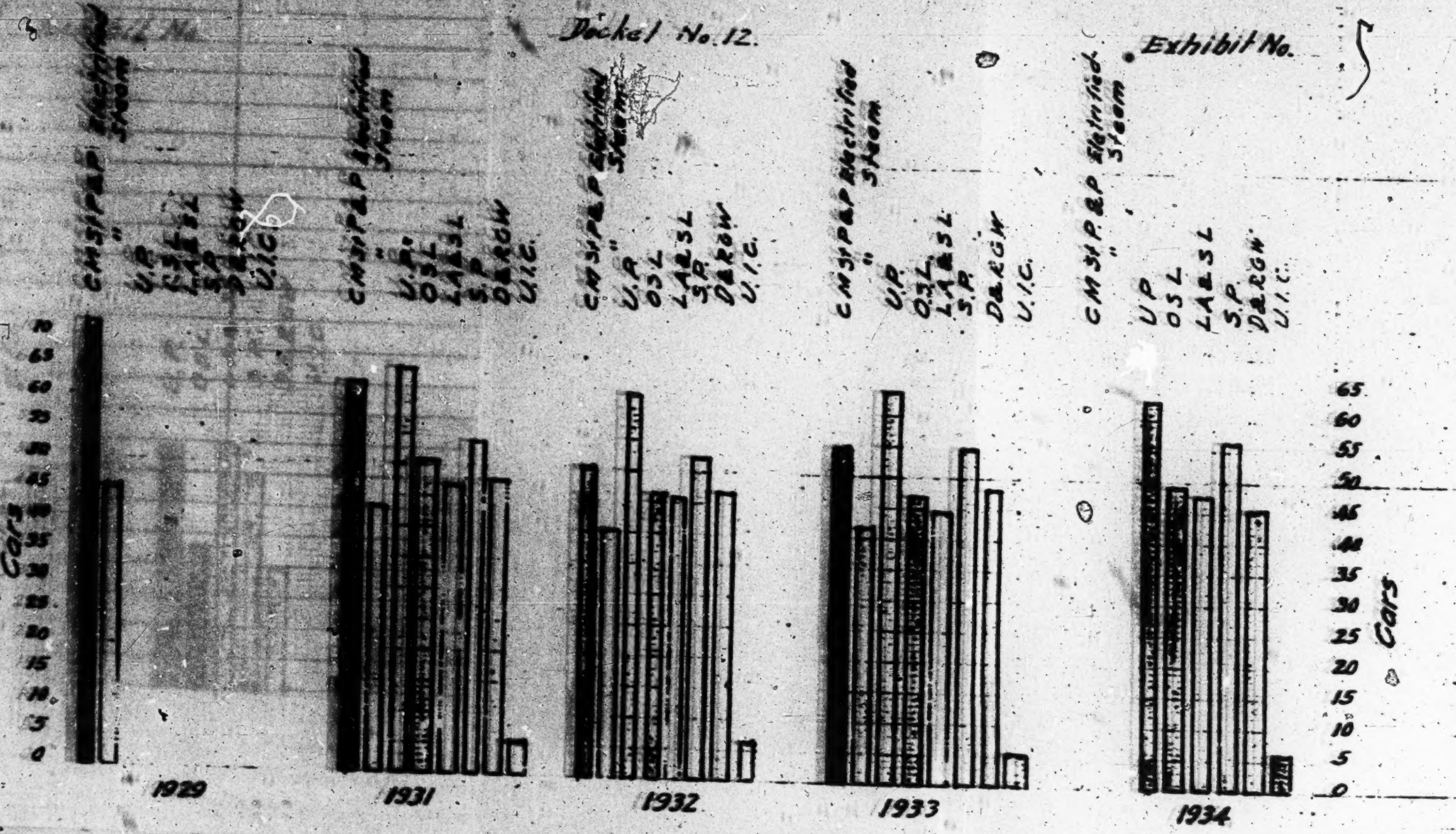
Passenger Car Miles per train mile	6.0	6.0	5.8	5.9
Cost of Enginemen & Trainmen per car mile, Passenger	4.82c			
	Electrified Operation			
Freight Train Miles	882,264	586,032	513,319	523,238
Freight Car Miles	64,054,929	37,323,057	26,029,362	28,359,930
Wages Enginemen & Trainmen, Freight	$649,724.00			
Freight Car Miles per Train Mile	72.6	63.7	50.8	54.2
Cost of Enginemen & Trainmen per car mile, Freight	1.01c			
Passenger Train Miles	1,016,939	810,257	513,790	501,741
Passenger Car Miles	10,300,341	6,949,061	5,440,642	5,491,323
Wages Enginemen & Trainmen, Passenger	$317,317.00			
Passenger Car Mile per Train Mile	10.1	8.6	10.6	10.9"
Cost of Enginemen & Trainmen per car mile, Passenger	3.08c			

Exhibit No. 22.

Before the Interstate Commerce Commission Re Railway Labor Act

Docket No. 12.

Exhibit No. 5



Freight Car Miles per Train Mile or Average Cars per Train

371½

Docket No. 33

Interstate Commerce Commission Re Railway Labor Act

Exhibit No. 12

Exhibit No.



Passenger Car Miles per Train Mile or Average Cars per Train

Before the Interstate Commerce Commission
Docket No 12
Exhibit No
Railway Line

Cost Engineering and Traffic Dept. per Car Mile Passenger

1928
1931
1932
1933
1934

Cents 0 1 2 3 4 5

C.M.St.P.&P. Electrified
" Steam
U.P.
O.S.L.
L.A.&S.L.
S.P.
D.&R.G.W.
U.I.C.

(Plaintiff's Exhibit No. 26, offered and received in evi
is in words and figures as follows:)

"June 29, 19

372 "Dear Sir:

"Pursuant to the recommendation of the Regional
rector, the Utah, Idaho Central Railroad is relinquished
Federal control.

"It will be the policy of the Railroad Administration
operate with relinquished roads as to a fair division of
rates, car supply, and, as far as may be consistent with the
tional needs, that there be no undue discrimination as to
ing

"If you feel that hardship may result from relinqui
and desire to make a contract on fair terms, right is re
to consider the advisability of making such a contract.

"Very truly yours,

"Mr. M. S. Browning,
President, Utah, Idaho Central Railroad,
Ogden, Utah."

...n Railway Labor Act)
Docket 12)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement of Revenues on The Utah Idaho Central Railroad Company
19 year period 1916 to 1934 inclusive

	1916	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928
...nger Revenue	*246,171.72	*278,336.83	*251,844.52	*373,071.65	448,184.01	387,691.52	347,517.26	328,066.60	288,219.82	244,605.97	211,763.20	178,175.39	161,688.76
...ggg. Revenue	4,556.64	1,007.27	289.29	1,296.18	1,329.73	1,417.87	1,335.19	1,411.61	1,365.85	1,126.78	984.91	966.91	763.60
...l Revenue	449.88	451.26	354.52	1,396.55	1,473.48	1,473.48	1,473.48	1,843.92	2,108.52	2,173.63	2,441.44	2,413.41	2,413.41
...press Revenue	8,952.39	11,742.41	13,125.46	23,196.49	38,062.16	17,093.46	27,324.73	23,873.65	20,521.91	18,804.14	18,137.67	17,642.71	15,917.71
...lk Revenue Frt.	5,322.46	11,165.08	12,448.80	15,117.91	13,693.75	11,058.33	10,765.44	18,074.75	20,707.11	19,762.69	19,063.00	14,364.25	13,846.04
...ght Revenue	173,962.46	255,309.41	295,518.19	408,610.56	506,001.97	463,316.15	375,383.98	413,449.41	460,620.14	459,995.64	428,914.70	493,562.82	526,516.72
...itching Revenue	156.75	617.00	2,410.00	2,719.00	814.25	1,148.00	323.30	9.45					
...ed. Transpn. Rev.			23.89		3.05								
Total Rev. from Transpn.	439,592.30	559,129.26	576,614.67	826,312.34	1,009,562.40	883,193.81	764,123.38	786,729.39	783,543.35	746,468.85	680,707.93	707,125.49	721,126.24
...venue from Other Ry. Opr.	7,400.10	20,857.43	29,827.05	26,439.84	46,438.63	49,066.09	57,561.17	51,771.22	35,295.98	38,801.18	38,645.41	61,440.93	61,798.61
Total Operating Revenue	446,992.40	579,986.69	606,441.72	852,752.18	1,056,001.03	932,259.90	821,684.55	838,500.61	768,839.33	785,270.03	719,353.34	768,566.42	782,924.85

* Does not include street car revenues of what is now The Utah Rapid Transit Company

MICROCARD
TRADE MARK ®

22

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EDITIONS, INC.
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BEFOLE THE INTERSTATE COMMERCE COMMISSION

Exhibit No. 28

atement of Revenues on The Utah Idaho Central Railroad Company
19 year perioc 1916 to 1934 inclusive

	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934
	357,691.52	347,517.26	325,000.00	308,719.52	264,026.07	211,703.20	173,175.39	161,098.76	146,564.60	115,545.02	99,632.57	67,410.45	61,429.99	61,346.25
	1,417.57	1,335.19	1,411.61	1,305.55	1,178.78	994.92	986.01	703.60	517.95	304.94	294.89	105.43	41.43	32.48
	1,473.48	1,473.48	1,943.93	2,108.32	2,173.68	2,444.44	2,413.41	2,413.41	2,616.64	2,660.35	2,657.37	2,660.35	2,660.37	2,660.33
	17,000.46	27,334.73	25,378.65	20,321.91	16,304.14	15,127.67	17,642.71	18,917.71	16,496.93	13,796.55	8,690.51	5,990.96	5,102.96	5,981.50
	11,958.33	10,765.44	12,874.—	20,[illegible]	10,702.80	10,953.09	14,364.25	13,948.04	4,336.20	9,753.66	4,334.30	—	2,900.58	—
	463,316.15	375,353.96	422,409.41	400,620.14	459,205.04	438,314.70	400,582.52	338,536.72	450,455.81	485,421.41	396,357.80	372,474.35	391,718.19	378,994.25
	1,143.00	322.20	9.45											
	853,198.51	764,122.26	788,720.39	733,543.35	744,462.85	680,707.53	707,125.49	721,126.24	630,986.68	607,512.24	501,756.68	448,641.56	463,813.51	448,911.81
	49,898.09	57,691.17	51,771.22	35,395.98	30,501.18	38,645.41	61,449.93	61,798.61	65,054.49	52,390.09	45,570.37	30,775.49	31,353.96	33,361.00
	902,350.80	821,864.35	840,898.61	768,939.33	785,370.03	719,353.24	768,584.42	782,924.85	713,936.52	659,902.33	580,657.05	479,417.05	495,167.47	482,272.81

(Plaintiff's Exhibit No. 27, offered and received in evidence, is in words and figures as follows:)

"Chronological history of existing labor agreements between The Utah Idaho Central Railroad Company including its predecessor companies and various crafts of employees.

"Agreement with Division 418—Amalgamated Association of Street and Electric Railway Employees and Coach Operators of America (an affiliate of The American Federation of Labor)

"This agreement includes trainmen, shopmen, barnmen, and substation operators.

1st Agreement effective May 25, 1909, expired May 15, 1911.

2nd Agreement effective May 15, 1911, expired May 15, 1913.

3rd Agreement effective May 15, 1913, expired June 1, 1917.

4th Agreement effective June 1, 1917, expired June 1, 1919.

5th Agreement effective June 1, 1919, expired June 1, 1920.

6th Agreement effective June 1, 1920, expired June 1, 1930.

"Above agreement amended June 1st, 1921.

"Above agreement amended June 1st, 1922.

"Above agreement amended June 1st, 1924.

"Above agreement amended June 1st, 1926.

7th Agreement effective June 1st, 1930, expired June 1st, 1931.

"Above agreement amended Sept. 16, 1931.

8th Agreement effective June 1, 1931, expired June 1, 1933.

"Above agreement amended June 1st, 1932.

9th Agreement effective June 1st, 1933, and still in effect.

"Above agreement amended Oct. 17, 1933.

374 "Above agreement amended June 1, 1934.

"Above agreement amended June 1, 1935.

10th Agreement with Shopmen, Barnmen and Substation Operators effective June 1, 1936 and expiring June 1, 1941.

"Agreement with the Station Employees Association 1st Agreement effective May 1, 1934, and still in effect.

"Above agreement amended May 1, 1935.

2nd Agreement effective May 1, 1936, expiring May 1, 1941.

Exhibits 27-1, 27-2, 27-3 (Abstracted)

375 Exhibit 27-1 is an agreement by and between the Utah Idaho Central Railroad Company and the Station Employees Association of the Utah Idaho Central Railroad Company, representing all persons employed in station service on the carrier's lines. The agreement covers such matters as rates of pay, hours, seniority and working conditions. The agreement is to run from May 1, 1936, to May 1, 1941, and from year to year thereafter.

Exhibit 27-2 is an agreement between the Utah Idaho Central Railroad Company and the Employees of the Electrical and Mechanical Department, represented by a committee of their own choosing. This agreement covers the same subjects as Exhibit 27-1. The agreement is to run from June 1, 1936, to June 1, 1941, and from year to year thereafter.

Exhibit 27-3 is an agreement between the Utah Idaho Central Railroad Company and Division 418, Amalgamated Association of Street and Electric Railway Employees and Coach Operators of America, representing the motormen, conductors, trainmen, trolleymen, motor coach operators, shopmen, barnmen, and sub-station operators on the Utah Idaho Central Railroad. The agreement covers the same subjects as Exhibit 27-1. The original agreement ran from June 1, 1934 to June 1, 1935, and from year to year thereafter. By amendments, included in Exhibit 27-3, the agreement was extended to June 1, 1936.

(Plaintiff's Exhibit No. 28, offered and received in evidence, is in words and figures as follows:)

"The Utah Idaho Central Railroad Company Condensed Income Statement

Years 1930 to 1935 incl.

	1930	1931	1932	1933	1934	1935
Operating Revenue	659,802.33	550.657.05	479,417.05	495,167.47	482,272.81	514,562.45
Operating Expenses	518,773.13	450,201.48	380,928.55	[illegible]0,521.83	364,993.86	367,846.48
Net Opr. Revenue	141,029.20	100,455.57	98,488.50	124,645.64	117,278.95	146,[illegible]5.97
Taxes	48,861.46	45,142.66	42,312.80	39,457.48	39,392.82	40,473.26
Operating Income	92,167.74	55,312.91	56,175.70	85,188.16	77,886.13	106,242.71
Other Income	126.00	165.75	37.08	19.44	60.57	4.00
Gross Income	92,293.74	55,478.66	56,212.78	85,207.60	77,946.70	106,246.71
Income deductions	124,317.29	123,971.18	123,590.85	122,340.12	124,826.91	124,183.69
Net Income	-32,023.55	-68,492.52	-67,378.07	-37,132.52	-46,880.21	-17,936.98"

Figures preceded by (1) are red in original exhibit. [illegible]

Re. Railway Labor Act
Docket #12

Delivered on U. I. C.

EXHIBIT NO. 28
Sheet No. 1

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement of Carload Business Handled by The Utah Idaho Central Railroad Company, Six Months Period July 1, 1934 to December 31, 1934

Showing Received Business by Commodities and as between Local and Various States of Origin and Forwarded Business by Commodities and as between Local and Various States of Destination

| STATE OF ORIGIN 26 States | TOTAL CAR-LOADS | LOCAL TO U. I. C. R R. | INTER-CHANGED WITH STEAM & ELECTRIC ROADS | COAL | CEMENT | GASOLINE | OIL | PIPE | STEEL GATES | STEEL | SAND, GRAVEL & ROCK | PLASTER | SALT | FUEL OIL | PET. PRODUCTS | SOAP | TERRA COTTA | BED SPRINGS | STEEL SASH | EARTH | SODA ASH | PAPER | TIES, LUMBER & POSTS | SHINGLES & LATH | BOX SHOOKS | TRACTORS | AUTOS | SHEEP | CATTLE | WALLBOARD | PULP | BRICK & TILE | CANS | COKE | BAGS | ROOFING | BEETS | POLES | BEER | HIGH EXPLOSIVES | SULPHUR | COTTON | WIRE | CEREAL | FURNITURE | WASHERS | JARS | MASH | SHOVEL | FOX FOOD | INSULATORS | SEED | CONSTR. EQUIPMENT | HAY | KEROSENE | QUARTZ | MELONS & FRUIT | LABLES | ORANGES | RICE | TWINE | STOVES | MILK | SUGAR | POTATOES | GRAIN | PULP | MISCELLANEOUS |
|---|---|---

Re. Railway Labor Act
Docket #12

Total interchange 4128
Total local 2226

Originated on U. I. C.

EXHIBIT NO. 28
Sheet No. 2

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement of Carload Business Handled by The Utah Idaho Central Railroad Company, Six Months Period July 1, 1934 to December 31, 1934
Showing Received business by Commodities and as between Local and Various States of Origin and Forwarded Business by Commodities and as between Local and Various States of Destination

STATE OF DESTINATION 31 States	TOTAL CARLOADS	LOCAL	INTERCHANGED WITH CONNECTIONS 31 States	MILK	SUGAR	POTATOES	CANNED GOODS	CATTLE	SHEEP	FLOUR	BRICK	GRAIN	HAY	ONIONS	FRUIT	SYRUP	SEED	PULP	TOMATOES	SAND-GRAVEL	LIME ROCK	POULTRY	VEGETABLES, MIXED	MACHINERY	CANTALOUPES	POULTRY	BEETS	MOLASSES	PULP	LUMBER	CANS	MISCELLANEOUS
Utah	2547	2041	506	71	360	15	15	87	28	17	14	71	3	7	3	4	2	8		247	26						1349		94	1	119	7
Wyoming	278		278	11	3	211	2		1			1		2	15				32													
Colorado	232		232	35	2	134	4	5	7			1		28	1				8									7				
Kansas	68		68		28	9	26							1					4												
Missouri	219		219		42	65	14							23	5		1		69												
Nebraska	130		130	1	67	4	16		31					2					9												
Idaho	273	185	88	12	4			1				7								14	60						174	1				
Washington	26		26	19	4		3																									
California	154		154	24	4	4	59	14	25						13				4			1	1	3		6						
Oklahoma	29		29		15	1	9										1														
Texas	77		77	15	29	9	7							6					11												
Nevada	12		12	8					4																						
Minnesota	22		22		16		1		4								1														
Ohio	15		15		14		1																								
Illinois	72		72		25	1	1		43										2												
Penn.	16		16				16																								
New Mexico	24		24	23	1																										
Oregon	4		4	3			1																								
South Dakota	4		4				4																								
Louisiana	2		2																2												
Iowa	55		55		52	1	1							1																	
Michigan	6		6		6																										
Wisconsin	3		3		3																										
New York	7		7	1	2		1																			3					
New Jersey	3		3		1		2																								
Tennessee	6		6		6																										
West Virginia	2		2		2																										
Maryland	3		3				3																								
Indiana	8		8		8																										
Montana	34		34	22		2	4								1				2				1		2						
Massachusetts	7		7																7												
Total	4338	2226	2112	245	694	456	190	107	143	17	14	80	3	70	38	4	4	8	150	261	86	1	2	3	2	9	1522	8	94	1	119	7

		Percentage
Forwarded Traffic Destined to Utah	2547	58.7%
Forwarded Traffic Destined Other States	1891	41.3%
Total	4338	100.0%
Local Forwarded Traffic	2226	51.3%
All Other Forwarded Traffic	2112	48.7%
Total	4338	100.0%

Exhibit 32 (Abstracted)

Tr. 513-523

xhibit 32 is the certificate of incorporation of The Utah ho Central Railroad Company. This certificate provides t "the objects and purposes for which, and for any of which, corporation is formed, and the nature of the business to be nsacted, are in part as follows:

"To acquire and hereafter to maintain, manage, operate and extend the railways (whether street or interurban, or railroads in general) property and franchises heretoowned or held by Utah Idaho Central Railroad Company, rporation organized and existing under the laws of the State Utah; also to build, construct, acquire by purchase, lease, or erwise, complete, equip, manage, maintain and operate by m, electricity, or other motive power, other lines of railway railroads outside of the State of Delaware;

cquire rights over or in connection with any other railways; perate all or any of its lines of railway by steam, electricity, ther motive power; * * * * to purchase, acquire, own, hold enjoy the benefits of and dispose of stock, bonds, and any all forms of obligations or securities of other railway comies, including street railway companies, * * * * also to purse, acquire, own, hold, manage and operate in any manner er railways; whether street, interurban, or railways in gen, and whether operated by electricity, steam, or other motive er, whether within or without the State of Utah and the te of Idaho, whenever and as thereunto duly authorized by * * * * *"

Ex. 33 524

Plaintiff's Exhibit No. 33, offered and received in evidence, words and figures as follows:)

"Pocatello, daho.
December 1st, 1933.

ar Sir:

"We are handing you herewith proposed schedule of rules, working conditions, and rates of pay which we have prepared from the information we have, according he needs and desires of the men in station and train service he Utah Idaho Central Railroad.

"We respectfully submit the same for your considera and adoption or advice of an early date as to when you can m with us and some of your own employees as provided by Pa graph Four, Section 2, of the Railway Labor Act of May 1926, to enter into a friendly discussion with a view of rea ing a satisfactory agreement.

"Yours very truly,"

(Signed) "H. C. Fanner
"Deputy President
Brotherhood of Railroad Trainmen"

"J. Stice
"General Chairman
Order of Railroad Telegraphers."

Plaintiff's Exhibit No. 34, offered and received in evide is in words and figures as follows:)

"Mr. H. C. Tanner, Deputy President, Brotherhood of Ra road Trainmen, P. O. Box No. 306, Ogden, Utah.

December 12, 1

"Dear Sir:

434 "In response to yours of December 1st submitting proposed agreement betwen the Brotherhood of Ra road Trainmen and The Utah Idaho Central Railroad Co pany, covering a schedule of rules, working conditions, a rates of pay for men in train service.

"Please be advised that this Company has an agreem with the Amalgamated Association of Street and Electr Railway Employees and Coach Operators of America, Divisi #418, which covers the rules, working conditions, and ra of pay for men in train service.

"Your truly,

"PHM:HK

"Carbon Copy to Arthur Ramsden, Pres.,
Amalg. Assoc'n. of St. & Elec. Ry. Employees and Co Operators of America, Division, 418, Ogden, Utah."

(Plaintiff's Exhibit No. 35, offered and received in evi-
5 dence, is in words and figures as follows:) 526

December 15th, 1933.

. H. Mulcahy General Manager, Utah Idaho Central Rail-
oad 417 Kiesel Building, Ogden, Utah.

ear Sir:

"This will acknowledge receipt of your favor of December
1933 for which I thank you.

"The contents of your letter have been noted and the
estion of jurisdiction has already been handled between the
otherhood of Railway Trainmen and the Amalgamated
sociation of Street and Electric Railway Employees. Mr.
F. Whitney, President of the Brotherhood of Railway Train-
n and Mr. W B. Fitzgerald of the Amalgamated Associa-
n of Street and Electric Railway Workers have settled
e question of jurisdiction.

"The majority of the members employed on the Utah Idaho
ntral Railroad are members of the Brotherhood of Railway
ainmen and the attached certificate of authorization has
en signed by practically all of your employees.

"I would appreciate a conference at your convenience in
der that we may enter into a friendly discussion and I will
ng with me these certificates referred to.

"I will appreciate a reply at your convenience.

"Respectfully yours,"

(Signed) "H. C. TANNER.

CT:JL" 527

(Attached to foregoing letter is a printed slip in words
5 and figures as follows:)

"Certificate of Authorization

"This certifies that the Brotherhood of Railroad Train-
n and its Constituted Officers and Committees representing
ainmen, yardmen, bus and truck line drivers employed on

busline
.....railroad
truck line

is hereby given full power and authority to represent the undersigned employee in any and all matters concerning working conditions, and rate of pay, which are now, or may hereafter be, under consideration between the aforesaid General Committee and the Management of the Railroad on which I am now employed.

"Signed.....

"Title of Position.....

"Post Office Address.....

"Division of Railroad.....

"Dated at.....

"Date.....

(Plaintiff's Exhibit No. 36, offered and received in evidence, is in words and figures as follows:)

437

December 15, 193

"Mr. H. C. Tanner, Deputy President, Brotherhood of Railroad Trainmen, P. O. Box No. 806, Ogden, Utah.

"Dear Sir:

"In reply to yours of December 15th and in further reference to mine of December 12th,

"The Utah Idaho Central Railroad Company considers itself a party to valid contract as outlined in my letter above referred to and feels that during the term of the contract it may not negotiate the matters referred to by you other than in accordance with the terms and provisions of said contract.

"Yours truly,

"PHM:HK"

(Plaintiff's Exhibit No. 37, offered and received in evidence, is in words and figures as follows:)

(On letterhead of "Brotherhood of Railroad Trainmen")

"F. R. Eckardt, Sec. 3531 Ogden Ave C. B. Doty, President 2223 Jefferson Avenue Printed in U. S. A. J. E. DeBano, Treas. No. 4 Holly Rue Apts 802-25th Street

"Brotherhood of Railroad Trainmen Ogden Lodge No. 68

Ogden Utah January 8th, 1934

Mr. P. H. Mulcahy, General Manager, Utah Idaho Central Railroad, 417 Kiesel Bldg., Ogden, Utah.

"Dear Sir:—

Concerning in the letter of Mr. H. C. Tanner Deputy President, Brotherhood of Railroad Trainmen to you under date of December *Ith* 1933, ninety three per cent of the employees of the Utah Idaho Central Railroad are members of the Brotherhood of Railroad Trainmen and we the undersigned have been elected as the local grievance committee to represent them. It is our desire to meet with you in conference relative to negotiating an agreement covering wages and working conditions for men engaged in train service on the Utah Idaho Central Railroad. The proposed schedule of rules, working conditions and rates of pay were sent you under date of December *Ith* 1933.

"Would appreciate an early date for this conference and would like to be advised sufficiently in advance to get committee together.

"Thanking you for an early reply we are

"Respectfully Yours"

(Signed) "W. H. Smith, Chairman"

(Signed) "W. A. STONE, Vice-Chairman"

(Signed) "W. JESSOP, Secretary"

CC-A. F. Whitney, President B. of R. T."

(Plaintiff's Exhibit No. 38, offered and received in evidence, is in words and figures as follows:)

"January 17, 1934.

Mr. W. H. Smith, 238 15th Street, Ogden, Utah. Mr. W. A. Stone, R. F. D. #2, Sunset, Utah, Mr. Willard Jessop, 3501 Washington Ave., Ogden, Utah.

"Gentlemen:

"In reply to yours of January 8th relative to a proposed agreement between this company and the Brotherhood of Railroad Trainmen.

"As you gentlemen are aware, this Company is a party to an agreement with Division 418 of the Amalgamated Association of Street and Electric Railway Employees and Coach Operators of America which agreement covers the rules, working conditions, and rates of pay for men in train service and in coach service and the company considers itself bound by the terms and conditions of that agreement.

"Yours truly,

"PHK:HK"

(Plaintiff's Exhibit No. 39, offered and received in evidence, is in words and figures as follows:)

(On letterhead of "Brotherhood of Railroad Trainmen"
"Ogden Lodge No. 68

"Ogden Utah April 13, 1934

"Mr. P. H. Mulcahy, Gen. Manager Utah Idaho Central R. R.
Ogden, Utah.

"Dear Sir:—

"Having been duly elected as a committee to represent and act for ninety per cent of the men emlpoyed in train and yard service on the Utah Idaho Central R. R. as members of the Brotherhood of Railroad Trainmen, it is our desire to meet with you in conference for the purpose of negotiating an agreement between the Utah Idaho Central Railroad Co. and the Brotherhood of Railroad Trainmen, covering wages, working conditions and hours of service for men working in train and yard service of said Utah Idaho Central Railroad.

"This agreement to become in force and effect June 1st 1934, the expiration date of the agreement now in force between the Utah Idaho Central Railroad Company and the Amalgamated Association of Street and Electric Railway Employees and coach operators of America.

"An early date for this conference will be greatly appreciated, Will you kindly advise sufficient in advance to permit the assembly of the committee.

"Respectfully yours"

(Signed) "W. H. SMITH, Chairman"

(Signed) "W. A. STONE, Vice Chairman"

(Signed) "W. JESSOP, Secretary

#3- 3501 Wash Ave
Ogden Utah

"cc to A. F. Whitney, Pres. D. A. Mackenzie

"Seal"

Exhibit 40 (Abstracted)

442 Exhibit 40 is a verbatim copy of an agreement proposed by the Brotherhood of Railroad *Trainment* to the Utah Idaho Central Railroad, to cover rates of pay, hours, seniority and conditions of employment for motormen, conductors, brakemen, trolley-men, and motor coach operators. This agreement was not accepted by the company. If it had been accepted, the cost of operations of the company would have increased $36,000 to $40,000 per year.

(Plaintiff's Exhibit No. 41, offered and received in evi-
456 dence, is in words and figures as follows:

(On letterhead of Hotel Utah:)

"The Hotel Beautiful Guy Toombes, Manager

Salt Lake City, Utah July 8, 1936

"Mr. P. H. Mulcahy, General Manager, Utah-Idaho Central Railroad, Ogden, Utah

"Dear Sir:

"The copy of the transcript of the statements made at our conference July 2nd, was received on the following date. I appreciate your prompt forwarding of it to me.

"On account of the week-end holiday there was a delay in my conferring with the United States District Attorney on

the question you raised as to the advisability, or the
457 right of the Brotherhood of Railroad Trainmen to initiate negotiations for a wage and rules agreement in accordance with the provisions of the Railway Labor Act, pending the date of hearing in Judge Johnson's Court on the Company's request for an injunction against the United States District Attorney enforcing the Railway Labor Act.

"After conferring with a representative of the District Attorney, it has been decided to take no further action on my request for a conference with representatives of the company to negotiate a wage agreement until after the date of the hearing in Judge Johnson's Court, which I understand is August 24, 1936.

"Yours truly,"

(Signed) "D. A. MACKENZIE

"D. A. Mackenzie, Vice President, Brotherhood Railroad Trainmen 1553 Linden Avenue, Long Beach, California
"CC—Mr. R. M. Rampton"

(Plaintiff's Exhibit No. 42, offered and received in evidence, is in words and figures as follows:

"Door to door service on your less than carload freight shipments

"Specify Utah Idaho Central routing on all your orders
458 thru freight rates with all lines

"Following morning delivery on all carload and L. C. L. freight shipments, between Cache Valley Points—Ogden and Salt Lake City.

"Express Service

"From all stations along this railroad, shipments by express may be sent over the shortest and most direct routes to any of the 25,000 points in the United States and Canada served by the Railway Express Agency.

"General offices 4th floor Kiesel bldg. Ogden Utah Phones 312, 313 Passenger Station Phone 1012 Freight Station Phone 1012.

"P. H. MULCAHY, General Manager
"J. B. HUNTER, Traffic Manager

—

"The Utah Idaho Central Railroad Company
" 'Cache Valley Route'

"Between Preston, Idaho; Logan, Utah Cache Valley points igham City, Ogden, Salt Lake City and *Intermedite* points

"Rail Route Over Collinston Divide Automobile Coach 9 Route Through Box Elder and Sardine Canyons Fast and Frequent Service Electric All Steel Trains Auto- bile Safety Coaches

"Careful courteous and efficient drivers.

"Westinghouse Air Brake Equipment

Time Tables Corrected to Sept. 1, 1935 Subject to Change Without Notice

The Utah Idaho Central Railroad Co. Time Tables

Ex. 42 552

ne Table No. 17		NORTH BOUND 1.			Read Up			
fective ptember 1, 1935	Dis- tance From Ogden	Daily Except Sun- Day	3 Daily	Coach 201 Daily	5 Daily	7 Daily	Coach 203 Daily
				A.M.	P.M.	P.M.	P.M.
eston (Ida) Ar.	94.7		10.35		4.45	7.00	10.00
Franklin.....							9.46
Fairview	88.7		10.22	P.M.	4.30	6.48	
wiston (Utah)	86.4		10.18	12.06	4.25	6.44	9.36
Sugarton	85.4		10.15		4.22	6.41	
Merrills.....	83.3		10.12	11.56	4.19	6.38	9.26
Richmond ..	81.3		10.09	11.53	4.16	6.35	9.23
Smithfield ..	75.2		9.57	11.45	4.04	6.24	9.15
Hyde Park..	72.4		9.51		3.56	6.16	
Logan ..... Lv.	67.5	A.M.	9.40	11.33	3.44	6.05	9.03
Logan ..... Ar.	67.5	7.52	9.34		3.39	6.00	
ovidence....	65.9	7.47	9.29		3.34	5.55	
Millville	63.9	7.42	9.24		3.29	5.50	
Hyrum	60.2	7.34	9.17	11.16	3.22	5.43	8.46

NORTH BOUND — Read Up

Time Table No. 17 — 1.

Effective September 1, 1935	Distance From Ogden	Daily Except Sunday	3 Daily	Coach 201 Daily	5 Daily	7 Daily	Coach 203 Daily
Wellsville	56.0	7.25	9.07	11.05	3.13	5.35	8.35
Mendon	50.6	7.15	8.57		3.02	5.25	
Beaver Dam..	43.5	A.M.	8.44		2.49	P.M.	
Collinston ..	39.9		8.35		2.40		
Dewey	36.0		8.30		2.35		
Honeyville	30.2		8.21		2.26		
Mantua				10.38			8.08
Brigham	21.1		8.05	10.25	2.10		7.55
Perry	17.3		7.53		2.03		
Willard	13.8		7.47	10.09	1.57		7.39
Hot Springs	8.6		7.38				
Harrisville	4.5		7.31				
Ogden ..... Lv.	0.0		7.20	9.45	1.30		7.15
			A.M.	A.M.	P.M.		P.M.

Bamberger Electric	Connections from Salt Lake City			
Ogden ..... Ar.	7.10	9.40	1.10	6.40
	Train	Coach	Train	Train
Salt Lake City Lv.	6.00	8.30	12.00	5.30
	A.M.	A.M.	M.	P.M.

Ogden, Plain City Service Via Harrisville

P.M.	A.M.			A.M.	P.M.
4.20	8.00	Lv.	Plain City Ar.	8.00	4.20
4.30	8.10		Poplar	7.50	4.10
4.37	8.17		Farr West	7.45	4.03
4.48	8.28		Harrisville	7.40	3.55
	8.45		17th and Wash.		3.40
5.00	9.00	Ar.	Ogden Lv.	7.25	3.25

"Service on School Days Only."

"SOUTH BOUND READ DOWN

6 Daily P.M.	4 Daily P.M.	Coach 204 Daily	Coach 202 Daily A.M.	2 Daily A.M.	
5.10	3.10		9.40	7.00	Lv.
			9.52		
5.21	3.20	P.M.		7.10	f
5.25	3.25	1.57	10.02	7.14	s
5.27	3.28			7.18	f
5.30	3.31	2.07	10.12	7.19	f
5.33	3.34	2.10	10.15	7.23	s
5.44	3.45	2.18	10.23	7.34	s
5.51	3.52			7.41	f
6.03	4.03			7.53	Ar.
6.07	4.07	2.30	10.35	7.57	Lv.
6.12	4.12			8.02	f
6.17	4.17			8.07	f
6.26	4.26	2.44	10.49	8.16	s
6.34	4.34	2.55	11.00	8.24	s
6.44	4.44			8.34	s
6.57	P.M.			8.49	f
7.03				8.55	f
7.12				9.04	s
7.21				9.13	f
		3.30	11.35		
7.36		3.40	11.45	9.28	s
7.44				9.36	f
7.50		3.52	11.57	9.42	f
7.58				9.50	f.
8.05				9.57	f.
8.20		4.20	12.25	10.10	Ar.
P.M.		P.M.	P.M.	A.M.	

"Employees are governed by rules which they cannot change. In event of any disagreement with conductor relative to tickets, etc., passengers are requested to pay the amount charged, taking receipt, and refer matter to the Traffic Manager.

"Lost articles found on cars, coaches, or in waiting rooms are forwarded to room 417 Kiesel Building, Ogden, and held for owner

"The railroad company will not be responsible for unchecked articles left in stations, cars, or coaches.

Connections to Salt Lake City

8.30	4.30	12.30	10.30	Lv
Train	Train	Coach	Train	
9.40	5.40	1.40	11.40	Ar
P.M.	P.M.	P.M.	A.M.	

's' indicates regular stop. 'f' indicates flag stop.

"In addition to the flag stops shown; trains will stop on flag at Broom, Union Pacific and Southern Pacific Interchange, Midway, View, Clays, Nerva, Woods, South Perry, Davis, South Brigham, North Brigham, Bristol, Harper, Calls Fort, Crystal Springs, Madsen, Pioneer, Beaton, Ukon, Beaver Dam, Summit, Kidman, Farrell, Petersboro, Hills; West Hyrum, Anderson, Humphries, South Logan, Greenville, Mack, Carson, Empey, Bert, North Cache High School, Idaline, Whitney, Beckstead and South Preston.

"All trains will make regular stop at Second North, Logan.

"Automobile coaches will stop on flag to pick up passengers, or will stop to discharge passengers upon request at any point on the highway outside of city limits. Within city limits coaches will stop at points designated by coach stop signs.

(Plaintiff's Exhibit No. 43, offered and received in evidence, is in words and figures as follows:)

"Statements of Interstate Commerce Commission Concerning Electric Railways Which Are Contained In Various Annual Reports From 1921 to 1935 Inclusive

464 "From the 35th Annual Report of the Interstate Commerce Commission, dated December 1, 1921.

"From page 21: "'Some difficulty has arisen in the construction of section 20a in its application to electric lines. Under the law as it now stands, we have no jurisdiction over the issuance of securities of a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.' Certain electric railways independently operated are engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers. The use of electricity as motive power for railways is rapidly increasing. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Under section 15a of the act we are given authority to include in groups of carriers for rate making purposes such interurban electric lines
465 as are engaged in the general transportation of freight. It seems desirable that section 20a of the interstate

commerce act be so amended as to indicate definitely the classes of electric railway companies subject to that section.'

"From the Summary of Recommendations on page 58, being paragraph 6 on said page:

"'That section 20a of the interstate commerce act be so amended as to indicate definitely the classes of electric railway companies subject to that section.'

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"From the 36th Annual Report of the Interstate Commerce Commission, dated December 1, 1922.

"From page 30: "'A number of electric interurban railway companies have claimed exemption from the provisions of section 15a on the ground that they are not operated as part of general steam-railroad systems of transportation or engaged in the general transportation of freight. Investigation shows that these lines offer a great variety of conditions with respect to the handling of freight. In construing the words of the statute, "general transportation of freight" we have taken into consideration not only the holding out of the carriers by means of tariffs and otherwise to handle freight, but in addition the extent of their actual freight service. With the in-
466 creased participation by electric interurban railway companies in the general business of transportation lines now considered exempt from the provisions of paragraphs (5) to 16), inclusive, of section 15a of the act may later come within their scope.'

"From page 32: "'Under the law as it now stands we have no jurisdiction over the issue of securities of a "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." Certain electric railways independently operated are engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Unless such lines are held not to be "street, suburban, or interurban"
467 electric railways, they are not subject to our jurisdiction under section 20a. Under section 15a of the act we are given authority to include in groups of carriers for rate making purposes such interurban electric lines as are engaged

in the general transportation of freight. It is desirable that section 20a of the interstate commerce act so amended as to also include explicitly electric railway companies engaged in the general transportation of freight.

"From the Summary of Recommendations on page 76, being paragraph 6 of said summary:

"'That section 20a of the Interstate commerce act be amended to include within its provisions electric railway companies engaged in the general transportation of freight.'

"From the Report of the Joint Committee of the Interstate Commerce Commission and of the National Association of Railway and Utilities Commissioners on Cooperation—being quite a lengthy report concerning an agreement on the subject of cooperation between the National and State commissions. Quotation is from page 233.

"'The Interstate Commerce Commission realizes that there is danger of overcentralization of authority, that the field of regulation is vast, and that the State commissions are often better informed than itself in regard to local conditions and local needs.'

"From the 37th Annual Report of the Interstate Com-
468 merce Commission, dated December 1, 1923.

"Quotation is from the Commission's recommendations on page 70:

"'We adhere to the recommendations made in last report.'

"From the 38th Annual Report of the Interstate Commerce Commission dated December 1, 1924.

"From page 20: "'Material difference of opinion developed concerning the status of electric railways under section 15a, and the question was accordingly made the subject of a hearing, following which a report was issued announcing general conclusions as to the application of the statute to such lines, 86 I.C.C. 751. Such further proceedings will be had as may be found necessary in dealing with individual companies.'

"From page 78, being the recommendation of the Commission.

"'We adhere to our previous recommendations.'

"From the 39th Annual Report of the Interstate Commerce Commission, dated December 1, 1925.

"From page 20: "'The number of electric railways
469 claiming *exemption* from the provisions of section 15a is 198. As stated in our preceding report our general conclusions with respect to the status of electric railways under the statute was announced in Application of Section 15a of the Interstate Commerce Act to Electric Railways, 86 I.C.C. 751. Such further proceedings will be had as may be found necessary in dealing with individual companies.'

"From page 32: "'While the major part of the service of the bureau of statistics necessarily has to do with the steam railways, reference may be made here to some of the most important data of the various other common carriers subject to our jurisdiction. The electric railways reporting to us operated 14,165 miles of road in 1928, the latest year for which detail compilations have been completed; their operating revenues amounted to $236,429,937; their operating income to $55,258,030; and their net income to $13,585,895.'

"From the recommendations of the Commission, on page 72, being paragraph 4:

"'4. That section 20a of the interstate commerce act be amended to include within its provisions electric railway companies engaged in the general transportation of freight.'

"3.

"From the 40th Annual Report of the Interstate Com-
470 merce Commission, dated December 1, 1926.

"From page 20: "'In our last report we stated that 198 electric railways claimed exemption from the provisions of section 15a. Several proceedings have been instituted to determine the status of individual companies, applying the principles announced in Application of Section 15a of the Interstate Commerce Act to Electric Railways, 86 I.C.C. 751, and it is expected that others will be necessary.

"From page 31: "'While the major part of the service of the bureau of statistics necessarily has to do with the steam railways, reference may be made here to some of the most im-

portant data of the various other common carriers subject to our jurisdiction. The electric railways reporting to us operated 14,234 miles of road in 1924, the latest year for which detailed compilations have been completed; their operating revenues amounted to $211,378,199, their operating income to $48162,431 and their net income at $9,177,533.'

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From the 41st Annual Report of the Interstate Commerce Commission, dated December 1, 1927.

"From page 6: "'In our last report we stated that
471 198 electric railways claimed exemption from the provisions of section 15a. There has been no material change in this status, and further proceedings will be instituted as may be necessary in individual cases supplementing or applying the principles announced in Application of Section 15a of the Interstate Commerce Act to Electric Railways, 86 I.C.C. 751.'

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"From the 42nd Annual Report of the Interstate Commerce Commission, dated December 1, 1928.

"From page 5: "'In our last report we stated that 198 electric railways claimed exemption from the provisions of section 15a. There has been no material change in this status and further proceedings will be instituted as may be necessary in individual cases supplementing or applying the principles announced in Application of Section 15a to Electric Rys., 86 I.C.C. 751.'

"From page 79: under a major sub-head as follows: "'Scope of Jurisdiction over Electric Railways'

"'In our annual reports to the Congress for various years since the enactment of the amendments of 1920, we have recommended that section 20a, relating to the issuance of
472 securities, be so amended as to apply to electric railway companies engaged in the general transportation of freight. Experience in the administration of the act, as well as changes in the conditions affecting electric railway companies, seem to require that consideration be given to the general subject of the application of various sections of the statute to those companies. At present, the general provisions of the act apply to electric as well as to steam railway companies, with certain

exceptions. Thus, the provisions of paragraphs (18) to (21) of section 1, relating to construction or abandonment of lines, are not applicable to—

street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

"'Section 15a, which provides the general rate scheme of the transportation act, 1920, including recapture of excess income, specifically excludes from its application—

"'(1) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation.

"'(2) interurban electric railways unless operated as
473 a part of a general steam railroad system of transportation or engaged in the general transportation of freight.

"The authority given us under section 20a to regulate the issuance of securities or assumption of obligations by carriers specifically excepts—a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.

"'In the construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways. Practically all of the interurban electric lines of the country are engaged to a greater or less extent in the transportation of freight. Ordinarily these lines have a preponderance of passenger traffic, but the large diversion of such traffic to highways through the increasing use of automobiles has led these carriers to endeavor to recoup these losses through increased participation in freight traffic. Certain electric railway lines for many years have engaged largely in "'freight transportation,
474 their business being substantially the same as that of steam railroads, the only material difference being in motive power. Where the functions of an electric line are substantially the same as *thos* of an ordinary steam railroad the public interest would seem to justify the exercise of our jurisdiction in the matters of securities, construction or abandonment, regulations of rates, recapture of excess earnings, and consolidation with other carriers or acquisition of control of one carrier by an-

other, to the same extent as in the case of steam railroads. However, the greatly varying circumstances of electric lines indicate the necessity of individual treatment. It is recommended that, instead of attempting to define the classes of electric lines that are exempt from our jurisdiction under the several provisions in question, a general exemption of all electric lines be substituted, excepting such lines as interchange standard freight equipment with steam railroad lines and participate in through interstate freight rates with such lines. Provision should also be made for the exemption of particular electric railway companies falling within the excepted
475 class, such exemption to be made upon aplication of any such electric railway company and if it is able to show to our satisfaction, after notice and opportunity to be heard, that it is not affected with an important national interest so far as the provisions in question are concerned.'

"From the Recommendations of the Commission, on page 8, being paragraph 11:

"'That the present exemption provisions of paragraph (2) of Section 1, Paragraph (1) of section 15a, and paragraph (1) of section 20a, applicable to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways, and participate in through interstate freight rates with such carriers; provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned.'

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"From the 43rd Annual Report of the Interstate Commerce Commission, dated November 30, 1929.

"From page 10: "'The complaint of George B. Hild
476 et al. v. Chicago North Shore & Milwaukee Railroad Co. No. 20518, pending at the close of the period covered by our last annual report, alleging in substance that the defendant had issued certain securities in violation of the provisions of section 20a of the act, was dismissed on the ground that it did not seek affirmative relief, but merely an expression of opinion

as to whether the provisions of the act had been violated. An application by the Cincinnati, Hamilton & Dayton Railway Co. for authority to issue securities in connection with the acquisition of certain interurban electric railways was dismissed on the ground that the applicant was not a carrier within the meaning of that term as used in section 20a of the act.'

"From page 89, paragraph 7: " 'That the present exemption provisions of paragraph (22) of Section 1, Paragraph (1) of section 15a, and paragraph (1) of section 20a, applicable to electric railways, be amended by substituting provisions
477 exempting all electric railways except such as interchange standard freight equipment with steam railways and participate in through interstate freight rates with such carriers; provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned.'

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"From the 44th Annual Report of the Interstate Commerce Commission, dated December 1, 1930.

"From pages 22 and 23: " 'Piedmont & Northern Railroad Company v. Interstate Commerce Commission, et al., 280 U. S. 469:

" 'In this case there was involved the validity of our order in Piedmont & Northern Construction, 138 I. C. C. 363. The commission proceeding was instituted by application filed by the Piedmont & Northern, an electrically-operated railway under paragraphs (18) to (21) of section 1 of the Act, asking authority to undertake certain extensions of its lines. The application was made with the understanding that the Piedmont & Northern reserved the right to contend that it was an interurban electric railway, excepted by paragraph (22) of Section 1 from
478 commission authority over construction of new lines of railroad; and, after filing its application, the Piedmont & Northern moved to dismiss on that ground. In our report we held that the Piedmont & Northern was not an interurban electric railway, within the meaning of the exception to our jurisdiction contained in paragraph (22), and, assuming

jurisdiction, we found that the proposed extensions of lines were not required by the public convenience and necessity. By order we denied the application. Thereafter the *Piedmond* & Northern instituted this suit under the urgent deficiencies act of October 22, 1913, asking, in substance, that our order taking jurisdiction of its said application and denying the same, be set aside and annulled. In addition to filing answer to the petition, we moved to dismiss on the ground that the court lacked jurisdiction because our order, denying the administrative relief prayed for, was negative within the meaning of the Proctor & Gamble case, 225 U. S. 282, and Lehigh Valley R. Co. v. United States, 243 U. S. 412. The lower court assumed jurisdiction and its decree, dismissing the petition of the Piedmont & Northern, was based upon the merits, that is, the court upheld our conclusion that the Piedmont & Northern was not an interurban electric railway within the meaning of the exemption contained in paragraph (22).

"7

479 "'Upon the appeal we renewed our objections to the jurisdiction of the court. The decision of the Supreme Court is to the effect that the lower court should have dismissed the bill of complaint for want of jurisdiction, rather than on the merits. Pertinent provisions of the opinion read as follows:

"'"Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the Act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the railway. Compare Proctor & Gamble Co. v. United States, 225 U. S. 282; Lehigh Valley R. R. Co. v. United States, 243 U. S. 412; United States v. New River Co., 265 U. S. 533, 540. * * * * Their sole contention is that the court below and the Commission erred in not holding that the Railway is an interurban electric railway within the exemption of paragraph 22. The defendants renew their objections to the jurisdiction of the Court.

"'"We think that the defendants' objection is well taken. * * * * If, as is contended, the Commission was without juris-

diction, the Railway is as free to proceed with the con-
480 struction as if the application had not been made and the commission had not acted. Nothing done by the Commission can prejudice the Railway's claim to immunity in any other proceeding.

"'"It is true that, if the Railway builds without having secured a certificate, it may suffer serious loss. For, a court may hold in an appropriate proceeding that the Railway is within the purview of paragraph 18. And the Railway may be thus subjected to the penalties prescribed by paragraph 20. These risks arise however, not from the order but from the statute. Compare Lehigh Valley R. R. Co. v. United States, 243 U. S. 412, 414. The order is entirely negative. It is not susceptible of violations and cannot call for enforcement. It does not finally adjudicate the Railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission but for violation of the provisions of the statute. * * * *

"'"If the statute gives the commission jurisdiction over the Railway's application, then concededly the order is not sub-
481 ject to attack. If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the Railway's plans. What plaintiffs are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts. * * * *"'

"From the 44th Annual Reports of the I. C. C. continued.

"From page 96, paragraph 6. "'That the present exemption provisions of paragraph (22) of section 1, paragraph (1) of section 15a, and paragraph (1) of section 20a, applicable to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways and participate in through interstate freight rates with such carriers, provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission after notice and opportunity to be heard, that they are not affected with an

important national interest so far as the provisions in question are concerned.'

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"From the 45th Annual Report of the Interstate Commerce Commission, dated December 1, 1931.

"From page 122, paragraph 16. "'That the present
482 exemption provisions of sections 1 (22), 15a, (1), and 20a (1) of the interstate commerce act, applicable to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways and participate in through interstate freight rates with such carriers, provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the Commission, after notice and opportunity to be heard, that they are affected with an important national interest so far as the provisions in question are concerned. The reasons for this recommendation were stated in our forty-second annual report for the year 1928, at pages 79-81.

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"From the 46th Annual Report of the Interstate Commerce Commission, dated December 1, 1932.

"From page 102, paragraph 5 of Group II.

"'That the present exemption provisions of sections 1 (22), 15a (1) and 20a (1) of the interstate commerce act, applicable to electric railways, be amended by substituting provisions exempting all electric railways except such as
483 interchange standard freight equipment with steam railroads and participate in through interstate freight rates with such carriers, provisions to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned. The reasons for this recommendation were stated in our forty-second annual report for the year 1928, at pages 79-81.'

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"From the 47th Annual Report of the Interstate Commerce Commission dated December 1, 1933.

"From page 20: "'To carry out the third purpose, the title makes it the duty of the Coordinator "forthwith to investigate and consider means, not provided for in this title, of improving transportation conditions throughout the country, including cost finding in rail transportation and the ability, financial or otherwise, of the carriers to improve their properties and furnish service and charge rates which will promote the commerce and industry of the country and including, also, the stability of railroad labor and other improvement of railroad labor conditions and relations." In pursuance of this
484 duty, he is directed from time to time to submit to us such recommendations calling for *fur*..... legislation to these ends as he shall deem necessary or desirable in the public interest, and the Commission is to transmit such recommendations, together with its comments thereon, to the President and to the Congress.

"'It will be noted that the investigations of the Coordinator in this respect are to cover all transportation conditions throughout the country, thus embracing not only the railroads but all other transportation agencies. Because of this duty which has been imposed upon the Coordinator, and the subsequent duty imposed upon us, other than already expressed, we shall not in this annual report make any recommendations with respect to further legislation. These will await the reports to be submitted to us by the Coordinator.'

"From page 51: "'United States v. Chicago, N. S. & M. R. Co. 288 U. S. 1.

"'The suit, under section 12 (1) of the act, was brought by the Government at our instance to enjoin the carrier from issuing any securities or assuming any obligation or liability in respect of the securities of others without first having obtained our authorization, as required by section 20a.
485 The only question was whether the railroad is an independently operated electric interurban railway, expressly excepted from the requirements of the section.'

"From page 73: "'On June 16, 1933, amendment of paragraphs (a), (f) and (g) of section 19a of the act was approved.

Paragraph (a), among other things, formerly authorized and directed us to value any street, suburban, or interurban electric railway subject to the provisions of the act whether such railway was or was not operated as a part of a general steam railroad system of transportation. Paragraph (a), as now amended, leaves to our discretion the valuation of any such railway not operated as a part of a general steam railroad system of transportation.'

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"From the 48th Annual Report of the Interstate Commerce Commission, dated December 1, 1934.

"From pages 15 and 16. " 'The Coordinator will, we understand, submit a further report or reports covering recommendations for transportation legislation at the next session of Congress. Because of this duty which has been imposed upon the Coordinator, and the subsequent duty imposed upon us in connection therewith, we shall not in this annual report,
486 except the two recommendations given below, make recommendations with respect to further legislation. These will await the reports to be submitted by the Coordinator.'

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"From the 49th Annual Report of the Interstate Commerce Commission, dated December 1, 1935.

"From page 20: " 'The Coordinator will, we understand, submit a further report or reports covering recommendations for transportation legislation at the next Session of Congress. Because of this duty which has been imposed upon the Coordinator, and the subsequent duty imposed upon us in connection therewith, we shall not in this report deal fully with the subject of the further legislation needed for the improvement of transportation conditions.'

"From pages 33 and 34:

" 'Scope of jurisdiction over electric railways'

" 'In our annual reports to Congress for the years 1928 to 1932, inclusive, we recommended that the exemption provisions of section 1 (22) and section 20a (1) applicable to electric railways be amended by substituting provisions exempting all electric railways except such as interchange standard freight equip-

ent with steam railways and participate in through interstate
eight rates with steam railways and participate in through
interstate freight rates with such carriers, the exemption
7 of particular railways to be made upon application and
satisfactory showing that they were not affected with an
portant national interest so far as the provisions in question
ere concerned. The reasons for this recommendation were
ated in our annual report for the year 1928 at pages 79-81.

"'In the construction of these exceptions great difficulty has
en experienced particularly in determining the roads properly
assifiable as interurban electric railways. In some instances
igation has been necessary for such determination. We re-
w our recommendation that the above provisions of the act
clarified by appropriate amendment along the lines of our
cision in Texas Electric Railway, 208 I. C. C. 193, in which
e said at page 202:

The Commission's view as to what constitutes an in-
rurban were stated in Rules for Testing Other Than Steam
ower Locomotives, supra. These views should not be lightly
eparted from after Congress has authorized the Commis-
on to determine the status of electric railways under a similar
emption provision in an act not otherwise administered by us.
In harmony with that and similar decisions, we are of
8 the opinion that an electric railway which is engaged
in the general transportation of freight, whether the
venue therefrom is greater or less than its passenger revenue,
hich handles the bulk of such freight in standard equipment
miliar to that used by the steam railroads, which freely inter-
anges the same with the steam railroads for transportation
or from points on their lines, a considerable portion thereof
eing handled in interstate or foreign commerce, and which
rticipates in *point* rates with the steam railroads for inter-
ate transportation, has more of the characteristics of a com-
ercial railroad operated by electric power than of an interur-
an as that term is used in the exemption provision under
onsideration.

"'We also recommend that a similar exemption of such elec-
ic railways as "carriers" from the provisions of section 5 (4)
nd (5) be made by limiting the definition of the term "carrier"
rough appropriate amendment of section 5 (17).'

"From pages 97 and 98:

"'4. That section 1 (22) and section 20a (1) be amended
489 by substituting provisions exempting from our jurisdiction all street, suburban and interurban electric railways except such as are operated as parts of general steam railroad systems of transportation or are engaged in the general transportation of freight and interchange standard steam railroad freight equipment with steam railroads for transportation of interstate or foreign commerce to or from points on their lines, and that a similar exemption of such electric railways as "carrier's" from the provisions of section 5 (4) and (5) be made by limiting the definition of the term "carrier" through appropriate amendment of section 5 (17).'"

Exhibits 44 and 45 (Abstracted)

490 The first paragraph of a report issued by the Interstate Commerce Commission in August 1935, entitled "Electric Railways, year ended December 31, 1934, Selected Financial and Operating Data from Annual Reports, Statement No. 3576," reads as follows:

"The electric railways reporting to the Interstate Commerce Commission are those engaged in interstate commerce. Such railways are chiefly the interurban as distinguished from the city street railways. In 1932 the interurbans carried only about 5.4 percent of the passengers travelling by electric railway but they received about 97.3 percent of the freight revenue. Electrified parts of steam railways are not covered by the statistics in this publication."

In the above-quoted paragraph, the word "interurban" was used to describe all of the 127 electric railways reporting to the Interstate Commerce Commission (excluding electrified parts of steam railway systems). The report contains a list of all the electric railways so reporting.

Among the electric railways so listed, are some which in formal opinions the Commission has held to be "interurban" and some which, in formal opinions, the Commission has held not to be "interurban".

Included in said list of 127 electric railways are the following lines: Utah Idaho Central Railroad Company, Piedmont & Northern Railway Company, Sacramento Northern Railway Company, Chicago South Shore & South Bend Railroad, and Pacific Electric Railway Company, Chicago, North Shore & Milwaukee, Cincinnati & Lake Erie Railroad Company, Indiana Railroad, and Arkansas Valley Interurban Railway Company.

The list of electric railways in the report includes some railroads whose revenues are derived entirely from passenger traffic, some whose revenues are derived entirely from freight traffic, and many whose revenues are derived from both passenger and freight traffic in varying proportions.

(Plaintiff's Exhibit No. 46, offered and received in evidence, is in words and figures as follows:) 690

Statement of Particularly Pertinent Parts of Bureau of Census Reports, With Regard to the Development of Interurban Electric Railways.

599 From "Special Reports of the Census Office, Street and Electric Railways, 1902, Department of Commerce and Labor," admitted in evidence by specific reference, In Utah-Idaho Central Railroad Company v. Dan B. Shields, United States Attorney,—No. 12294 Equity,—(R. 242):

"During the past few years there has been an extraordinary development of electric railways outside the limits of cities and villages, and a considerable proportion of these suburban and interurban lines are located on private rights of way and not on the public thorofare."

"The methods and service of some electric interurban lines already resemble those of the steam railways in many important respects."

"The conditions of business of the typical modern interurban railway differ so greatly from those of the ordinary street railway as to require special discussion. This subject has a peculiar interest because of the fact that the interurban business is of recent development, most of the faster and longer lines having been constructed within the past five years"

"The Central States, Ohio, Michigan, Indiana and Illinois possess the most extensive and efficient high speed interurban railways in the country and illustrate most clearly the future possibilities of this method of transportation."

"Much more remarkable has been the growth of freight
600 traffic on some of the lines. The report of the railway last mentioned shows that freight earnings are increasing by some 20 to 30% each year."

"The electric interurban railways possess in contrast with steam railroads several peculiar characteristics which directly affect their method of operation and these in turn determine the amount and character of their traffic."

"Small units and frequent service. The greatest difference between the electric and the steam railway lies in the fact that the former operates cars each of which has its own motors supplied with energy from a single distant source while the cars of the latter are moved by a separate locomotive which generates its own power. Steam operation, therefore, tends to infrequent service while electric operation lends itself to frequent service."

"Frequency of stops. The fact that single units of comparatively light weight are operated upon electric railways permits stops to be made much more quickly than with heavy steam trains, and likewise permits a much more rapid acceleration after the start. It is, therefore, possible for interurban cars to make comparatively frequent stops while maintaining high average speed."

"Operation in the streets of towns and cities. By running upon the public streets, when they enter a city or town, and by making frequent stops within municipal limits electric railways become usually much more accessible to passengers than steam railroads, which, as a rule, have only a single station in a town and that perhaps at some distance from its business center."

"Other advantages of electric lines for interurban service. Other peculiarities or interurban railway service, although they are of less importance, may be mentioned. One of these is the fact that the electric car can surmount grades and pass curves more readily than a steam train."

"To the agricultural population, as such, the steam rail-
601 ways offer no special conveniences. The farmer must go to town to take the train. If he lives on an electric railway the car may stop at his very door."

"In the Central West at least 75% of the interurban roads are located on private rights of way from 30 to 40 feet wide for single track on which a standard road bed is laid with 70 to 80 pound rails. As a general thing the electric roads have been less careful than the steam roads to avoid grades and curves. The bridge construction along such roads, however, is very often of a superior character, consisting of steel girder construction and comparing favorably with steam railway practices."

"The most extensive development of freight and express business has taken place on the interurban lines. Many of the cars on these roads are ordinary freight cars with brake equipment, etc. similar to that on steam railways."

"It has been held by the New York courts that a steam railway, as a common carrier, is bound to exchange freight with electric lines and to furnish the same facilities for doing so that it furnishes to steam railways."

(Plaintiff's Exhibit No. 47, offered and received in evidence, is in words and figures as follows:)

"From "Special Reports of the Bureau of Census, Street and Electric Railways, 1907, Department of Commerce and Labor," admitted in evidence by specific reference, in Utah-Idaho Central Railroad Company v. Dan B. Shields, United States Attorney,—No. 12294, Equity,—(R. 243-244):

"The interurban companies frequently own their right
602 of way and hence in districts where interurban lines have been extensively developed a considerable portion of the track is on private right of way. Of the total increase in track during the five year period, which amounted to 11,826.57 miles, 60.6% was on private right of way. The new track on private right of way shows an increase of 188.6% over that of 1902. The statistics by geographic divisions show large increases in track on private right of way—for the Western

division 514.2%; the North Central division 218.9%; and the North Atlantic division 153.2%."

"The development of freight and express traffic on interurban and rural lines has resulted in a large increase in cars especially equipped for this service While the increases in trackage, capitalization, earnings from operation, etc. as shown elsewhere range from 50 to 70%, the increase in number of express, freight and mail cars and in income from freight business is over 400%."

Express, freight and mail cars in the year 1902 totaled 1,114. In the year 1907 they totaled 5,669. One electric railway in Illinois was exclusively engaged in the transportation of freight.

"The carriage of mail, express and freight matter is a comparatively new but rapidly developing branch of interurban traffic. Freight traffic on electric railways made rapid strides during the five years between censuses. The number of companies reporting a freight business increased by 75.4% and the income by 403.9%."

The total income reported from the transportation of freight in the year 1902 was $1,038,097; in the year 1907 it was $5,231,215.

"One of the leading features, if not indeed the principal one, of electric railway development during the period 1902 to 1907, was the extension of the interurban electric railways which are now to be found in almost every part of the
603 country, and which, in many instances, by the extent of their operations, rival main lines of steam railroad. In the report for 1902 considerable attention was paid to this development of which the various elements were discussed for the first time."

"From this survey of one or two different fields it will be seen how rapid and far-reaching the interurban development has been. One of the most active years in the entire period was 1906 when such an extraordinary development *occured* throughout the State of Ohio that by the end of the year there were in operation in the state at least 2600 miles of strictly interurban lines."

"Only a small proportion of steam railroads have thus far adopted the telephone, but with few exceptions interurban lines all over the country use the telephone system for train dispatching. From the standpoint of the interurban roads it has been noted the steam code of the American Railway Association did not meet all the conditions of street railway operation as satisfactorily as the other modified codes, the principal objection being that it is too cumbersome to adapt itself readily to the quicker movement made necessary by the passage of more frequent single cars or short trains upon which the interurban system is essentially based."

"The variety of freight and express carried is remarkable and includes all kinds of commodities and merchandise. One system reports as high a proportion as 52.9% of freight revenue.

(Plaintiff's Exhibit No. 48, offered and received in evi-
604 dence, is in words and figures as follows:) 695

From "Central Electric Light and Power Stations and Street and Electric Railways, 1912, Bureau of the Census," admitted in evidence by specific reference, in Utah-Idaho Central Railroad Company v. Dan B. Shields, United States Attorney,—No. 12294, Equity,—(R. 244-246):

"For the period 1907-1912, the increase in track was 6,661.26 miles, of which 3,821.88 miles or 57.4% was on private rights of way. In districts where interurban lines are extensively developing a large portion of the track is now on private rights of way. Since 1902 track on private ways has increased nearly four-fold and such track now forms considerably more *then* one-third of the entire trackage."

Express, *frights*, mail and baggage cars in the year 1902 numbered 1,114. In the year 1907, 5,569. In the year 1912, 7,794.

In the year 1902 there were 3 electric locomotives reported. In the year 1907 there were 117. In the year 1912 there were 277.

In the year 1902 the revenues derived from freight, as reported, amounted to $1,038,097; in 1907 it was $5,231,215, and in 1912 it was $10,165,616.

"The growth in freight, mail baggage and express business was specially large in the Western Central division, both north and south and on the Pacific Coast."

"The development of interurban lines has brought in a large amount of freight and express business."

Plaintiff's Exhibit No. 49

605 Condensed Statement of Plaintiff's Exhibit No. 4, which is the record before the Interstate Commerce Commission.*

Appearances:

Devine, Howell & Stine of Ogden, Utah, appeared for Utah-Idaho Central Railroad Company.

D. A. Mackenzie of Long Beach, Calif., appeared for Brotherhood of Railroad Trainmen.

Proceedings

Examiner Steer: The Interstate Commerce Commission has assigned for hearing at this time and place its Railroad Labor Act Docket No. 12, Utah-Idaho Central Railroad Company.

This proceeding was instituted at the request of the National Mediation Board, to determine whether the Utah-Idaho Central Railroad Company falls within the terms of the proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21st, 1934, which proviso reads as follows:

"That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed, upon request of the Mediation Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

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*Exhibits referred to herein which are identical with those received by the court with like or different number are not set out but are included herein by reference to the court exhibit.

The carrier will introduce its evidence first, without
606 prejudice to any question regarding the burden of proof,
and others interested will then be afforded opportunity
to introduce their evidence. (Tr. 3)

Mr. Stine: Mr. Examiner, we wish to place this objection in the record:

Comes now the Utah-Idaho Central Railroad Company and objects to the jurisdiction of the Interstate Commerce Commission over this hearing and all matters involved therein, upon the ground that the Railway Labor Act was and is, under the Constitution, beyond the powers of Congress to enact; and upon the further ground that the National Mediation Board has no lawful power or authority to request the Interstate Commerce Commission to conduct this hearing for any purpose, so far as the Utah-Idaho Central Railroad Company or its employes are concerned; and upon the further ground that the National Mediation Board has no jurisdiction or authority over the Utah-Idaho Central Railroad Company, or its employes; and upon the further ground that the Railway Labor Act does not apply to the Utah-Idaho Central Railroad Company or its employes, and neither the Utah-Idaho Central Railroad Company nor its employes are in any manner subject to the provisions of the Railway Labor Act.

Examiner Steer: The objection will necessarily have to be overruled by the Examiner. The Commission always assumes that Acts of Congress are valid, unless and until otherwise determined by the courts.

Mr. Devine: Merely for the purpose of the record, we take exception, of course, to the ruling, on each of the grounds stated. (Tr. 4-5)

Carrier's Evidence

607 P. H. Mulcahey, Ogden, Utah, testified as follows: I am General Manager of the Utah-Idaho Central Railroad Company, having been associated with that company since 1917. Prior to that I was connected with the Southern Pacific from 1909 to 1917, and from 1906 to 1909 with the old Wells-Fargo Express Company. As General Manager of the Utah-Idaho Central for the period stated, I have become entirely familiar with its operations and physical properties. The Utah-Idaho Central is operated by electric power, has no steam operation

whatever, and does not own any steam equipment of any kind or character. (Tr. 5-6)

Exhibit No. 1 is a general map of the Utah-Idaho Central, showing the territory served, and the various towns and municipalities through which it runs. This exhibit received in evidence, without objection. (See Court Exhibit No. 1.) Exhibit No. 1 shows in red lines the main line and branches of the Utah-Idaho Central, indicating that the line starts in Ogden, Utah, and runs through Box Elder and Cache Counties in Utah, and terminates in Preston, Franklin County, Idaho, with two branch lines, one running west in Weber County, from Harrisville to Warren, and the other west and south in Cache County, from Lewiston to Quinney and Thain. The exhibit likewise shows the various towns and stations through which the line operates. Between the station of Dewey, about in the center of the map, before the curve, and the station Wellsville, at the south end of the first curve, is a heavy grade known as Collinston Hill. This curve is required in order to permit a grade over which an interurban operation can get over that Collinston Hill. The distance from the bottom on the south side of the hill to the bottom of the north side is approximately 13 miles.
608 Collinston Hill is actually a mountain, a part of the Wasatch Range, and is the divide between the Salt Lake Valley and Cache Valley. The entire area from Wellsville, at the foot of the Collinston divide, on north, through and beyond Preston, for a distance of about 5 or 6 miles, is in one general valley which is known as Cache Valley. That valley is entirely surrounded by mountain ranges, except for the passes. Six miles out of 94 miles of main line lies within the State of Idaho. (Tr. 6-9)

(In reply to Mr. MacKenzie) It is the practice for steam railroads to lay out their right-of-way in a circuitous route in order to get more favorable grades, except for the fact that in the interurban railroad lay-out the route is a more difficult route, both as to curvature and grade, than can be accomplished by a steam railroad. In fact, I might elaborate on this particular point: A substantial portion of this grade line from Dewey to Wellsville many, many years ago constituted a grade line for a steam railroad, possibly seventy-five years ago, which was of necessity abandoned by reason of difficult grades and

curvature, and became unfit for what is known as a steam operation today. The maximum gradient is two percent. Steam railroads operate over greater gradients than that but it is not a proper steam railroad operation over two percent grade and ten and twelve degree curves. When it is possible, even very large expenditures are made to find a route with a flatter curve and less gradient. In fact, the curvature is possibly a more difficult factor for transcontinental operation than the gradient. (Tr. 9-10)

(In reply to Examiner Steer) The map shows that the Utah-Idaho Central parallels the main line of the Oregon Short Line Railroad as far as the station Dewey, which I have men-
609 tioned. Then the main line of the Oregon Short Line bears to the west. From Dewey on it bears to the west and goes through Bear River Canyon, in order to accomplish a more feasible steam route with less grade and less curvature, into the station known as Cache Junction, which is north of the curve on our line and west of what might be called tangent on the map. From Cache Junction the main line bears to the west and north, and there is a branch that goes from Cache Junction into Cache Valley, and parallels our line again from thereon. (Tr. 10)

The Utah-Idaho Central's lines are not located entirely on private right-of-way; a substantial portion is located on streets and county roads under authority of franchises from the various political subdivisions. That is illustrated by Exhibit No. 2, which contains the copies of the county and municipal franchises under which the railroad company operates. That exhibit starts from Preston south and includes all of the franchises from counties, towns, villages, and municipalities generally. (Tr. 11)

The first page in this exhibit is the franchise from the city of Preston, in Idaho, and the underscored wording is underscored for the purpose of this hearing, and to illustrate in this exhibit the thing that is common in each of the other franchises: That, first, the authority is granted to this Company to operate a single or double-track street and interurban railway. In Section 2 the restriction is put on the exhibit that the Company shall use electricity, compressed air, or liquefied

air, as motive power; and further, in that section it amplifies
that it shall be used for the purpose of running or oper-
610 ating such main lines of street or interurban railway.
In Section 3 again the franchise specifically refers to interurban line of railway and to street railways only. In Section 6 it again refers or limits this franchise to street or interurban electric railway. In Section 7 it specifically provides that steam shall not be used as a motive power in the operation of such railroad, except in the construction thereof, or for the movement of obstructions and disabled cars, and for the clearance of said railroad from all obstructions and from wreckage in case of accident. In other words, we are limited, in this franchise, to the operation only of a street and interurban railroad. We must use electric power or liquefied air, and we may not use steam except in emergency. This Preston franchise was subsequently amended, at page 3 of the exhibit, to permit the use of the highways for a bus operation, and refers in there again to electric railways, but carries no amendment amplifying or changing our limited authority to merely operate a street interurban electric railway and not to operate with steam. Our main-line railroad enters Preston, Idaho, at approximately the south city limits on the main street of the city, and operates due north into approximately a block of the main retail business section. We have practically no private right-of-way in Preston other than the main street of the city, except possibly for two or three hundred feet in turning off our main line into the city. (Tr. 12-13)

In substance, these franchises are identical through each town, city and village from Preston, Idaho, southward to and including Ogden. In the town of Smithfield we enter Smithfield on the main business street at the south city limits, and operate due north over the main street through the business
section, and leave Smithfield at the north city limits on
611 that same main business street. At the town of Lewiston we occupy less street than possibly any other town through which we operate, but we do operate within 75 feet, I would say, of the beginning of the business section of the city. In Richmond, we enter Richmond at the south city limits on a side street that is about 800 feet from the business section, and operate due north over that side street until we leave it at the north limits. Logan is the fourth largest city in the State of Utah, and with the exception of Ogden, the largest city through

which we operate. We enter the city of Logan at the south city limits on the main business street, and progress along that main business street to the north city limits, and leave the city there. That main business street is also a portion of the main north and south U. S. Highway No. 91, the Yellowstone Park highway. We enter Wellsville at right angles to their main business section, and occupy a side street until we come to the business section, make a sharp left turn, and operate along the only business street in Wellsville, and leave Wellsville City at the end of that business street. It is likewise true of Providence and Hyrum that our line is on the city streets. The rest of these towns, passing over the hill and coming down to Brigham City, are small towns. We are on the street for a short distance, but the Dewey street in only a short distance. Brigham City, as we classify it in Utah, it is a fairly good-sized town, and we occupy the city street for the entire distance through Brigham City. We enter Ogden on 17th Street and Lincoln Avenue. Lincoln Avenue is the street just 300 feet west of this building. We occupy that street right up to 24th Street. It is the other side of this city block, the next street. Our terminus in Ogden is within about a block and a half of what
612 is commonly considered the center of the business section of Ogden. I have nothing further to say on Exhibit No. 2, other than that each one of these franchises carries the same specific authority to operate there a street or interurban railroad, carrying the same limitation as to the use of electric power. (Tr. 13-16)

(In response to Mr. MacKenzie) I assume that some railroads also occupy city streets in passing through, but not under interurban franchises. (Tr. 17)

Exhibit No. 2 received in evidence without objection. (See Court Exhibit No. 2.) (Tr. 18)

Exhibit No. 3 details the corporate history and development of the Utah-Idaho Central. That exhibit received in evidence without objection. (See Court Exhibit No. 3). Exhibit No. 3 is a historical sketch of The Utah-Idaho Central Railroad Company and its predecessor corporations. The present Utah-Idaho Central Railroad Company is the result of the combination and ension of several small street-car and interurban properties. had its inception in Ogden, Utah, about 1890, from a street-

car system approximately three or four miles long, upon which was operated some horse-drawn cars. This company eventually became insolvent, and when liquidated its assets were purchased by a group of Northern Utah citizens, headed by the late David Eccles, who organized a corporation under the laws of Utah which was known as the Ogden Rapid Transit Company. This change took place in the late nineties and thereafter marked the beginning of the rehabilitation, electrification and further expansion of the properties which are known today as the Utah Rapid Transit Company, located within the corporate limits of Ogden City, and The Utah-Idaho Central Railroad Company, the interurban line in question. (Tr. 18-19)

Sometime in the late nineties a corporation was formed
613 under the name of the Ogden and Northwestern Railroad Company, which built a small interurban line of railroad from north city limits of Ogden along the country roads to Hot Springs in Box Elder County, and operated thereon for passenger and some freight business, their initial power being furnished by a small steam locomotive. The rails of this new company connected at the north city limits of Ogden with the rails of the Ogden Rapid Transit Company on Washington Avenue; the two companies jointly handling interurban traffic. Subsequently the same interests who owned or held control of the Ogden Rapid Transit Company acquired the ownership of the Ogden and Northwestern Railroad Company, and from that time on operated common equipment over both properties. Approximately in the year 1910 the Ogden Rapid Transit Company, as a corporation, acquired the property of the Ogden and Northwestern Company, and equipped the latter Company for an electric interurban operation, and also extended the line along the public highway from Ogden Hot Springs to Brigham City, Utah, which is located twenty-one miles north of Ogden, operating electrically over the entire line for the transportation of passengers and freight. (Tr. 19-20)

Contemporaneously with this development between Ogden and Brigham City, practically the same people who owned the Ogden Rapid Transit Company built a line of street and interurban railway in the City of Logan, Cache County, Utah, extending same northward through Hyde Park to Smithfield, Utah, a distance of about eight miles, and south through Providence, Millville and Hyrum to Wellsville, Utah, a distance

of approximately twelve miles, operating over this interurban by means of electrical power and handling passenger and freight business, the freight business being largely agricultural products produced in the vicinity of their line of rail-
614 road. About the month of May, 1914, the Ogden Rapid Transit Company, operating in Ogden City and from Ogden, Utah, to Brigham, Utah, and the Logan Rapid Transit Company, operating in the Logan City and between Wellsville, Utah, and Smithfield, Utah, were consolidated into a single corporation under the laws of the State of Utah, known as the Ogden, Logan and Idaho Railway Company. This corporation for a time thereafter operated all of the properties formerly owned and controlled by the Ogden Rapid Transit Company and the Logan Rapid Transit Company, and also, commencing about the time of the consolidation, rebuilt a portion of the line extending from Ogden northward through Brigham City, and constructed a new line from Brigham City north over the Collinston Divide into Cache Valley, connecting with the southern terminus of the Logan Rapid Transit Company. Also extending the northern terminus from Smithfield, Utah, to Lewiston, Utah, a distance of eleven miles, and eventually crossing the state line to Preston, Idaho, which lies approximately six miles north of the Utah State Line. The Ogden, Logan and Idaho Railway Company continued thereafter to operate the street-car system in the City of Ogden, the street-car system in the City of Logan, and also the interurban line which had been developed out of the interurban properties of the Ogden Rapid Transit Company and the Logan Rapid Transit Company, continuing to carry on the same general character of business of transporting both passengers and freight with electric cars. (Tr. 20-22)

In the latter part of 1919 it seemed desirable to segregate the interurban operations of the Company from the purely local street-car operations in the City of Ogden and the suburban operations extending east from Ogden City into Ogden Canyon.
615 Accordingly, a new corporation was formed, known as the Utah Rapid Transit Company, which took over and operated the local Street-car system in Ogden, Utah, and the suburban line running east from Ogden into Ogden Canyon. The ownership and operation of the interurban railroad from Ogden, Utah, to Preston, Idaho, remaining with

the Ogden, Logan and Idaho Railroad Company, which has changed its name to Utah-Idaho Central Railroad Company. Utah-Idaho Central Railroad Company, a Utah corporation, continued to operate these interurban lines until the latter part of the year 1926, when a corporate reorganization took place and the properties were then continued under the ownership and operation of The Utah-Idaho Central Railroad Company, a Delaware corporation, which is the present owner and operating company. (Tr. 22)

Throughout all of these developments of this interurban property through the various companies previously named, the personnel of its employes and owners has to a very large extent remained that of the original street-car and interurban companies, namely, the Ogden Rapid Transit Company and the Logan Rapid Transit Company. (Tr. 22-23)

(In reply to Examiner Steer.) There are no steam railroads or other railroad companies directly or indirectly affiliated in the ownership of the Utah-Idaho Central Railroad Company. (Tr. 23)

No official of the Utah-Idaho Central Railroad Company holds official positions with any steam railroad company. No bonds or stock of the Utah-Idaho Central Railroad is owned directly or indirectly by any steam railroad company, or any other railroad company, or any holding corporation, or any persons interested in any steam railroad. (Tr. 23)

(In reply to Mr. MacKenzie.) Amplifying the last para-
616 graph of my statement regarding the personnel remaining largely the same through corporate changes, I might say that this venture is the result of purely local efforts on the part of citizens of northern Utah to develop northern Utah through the furnishing of the type of service peculiar to interurban railroads. In our growth from small interurban railroads and street-car companies, as I have outlined previously in this exhibit, these same people have continued, to a large extent, as owners and investors of the present property, and in many, many cases, except where age has created a bar, even the same employes, some who originally worked on the old Ogden & Northwestern, are still in the service of the Company. There has been no change in the character of the

Company during all these amalgamations. As indicated here, the city lines in Ogden City were in 1920 incorporated under the name of the Utah Rapid Transit Company. Those employes maintain their own seniority rights. The city operation in the City of Logan has been converted into a city bus operation, and those employes hold seniority rights, according to their qualifications, on either the interurban or the Logan City lines, as we call them. (Tr. 24-25)

But our seniority rights in recruiting our employes date back to the time when it became a street-car system. In other words, the employes that worked thirty-five years ago on the Ogden street-car company, and elected to qualify in the interurban operation, maintain their seniority, dating back from their first employment in the Ogden street-car company. (Tr. 25)

(In reply to Mr. MacKenzie) Their seniority in the service of the Company and in the choice of the interurban runs, and for the various purposes seniority is used and is valued. It goes back to their original employment in the street-car company. The employes operating the local street-car lines here do not have the right to exercise their seniority for like positions on the interurban line. As I explained, the
617 local Ogden Street-car Company is now a separate corporation, but the employes on the Logan City service have the right to exercise, according to their qualification and seniority date, on the interurban line. (Tr. 25-26)

(In reply to Examiner Steer) The average number of employees in 1934 as reported to the Interstate Commerce Commission was 150. (Tr. 26)

(In reply to Mr. MacKenzie That is the total number of employees in the service of the company, including the interurban line and the Logan city service and the bus operation that I mentioned. (Tr. 26)

No transcontinental or steam carrier has any holdings, directly or indirectly, of any kind or character, monetary or otherwise, in this company. No operating officer of this railroad is directly or indirectly connected, or has any relationship of any kind or character with any steam or transcontinental carriers to my knowledge, and if there was any such I would know it. Other carriers have no direction of the movement

of our trains, the movement of our business, or control ove it, in any manner or at all, and the operation of the Utah-Idah Central is totally and absolutely independent of any carrier connecting or otherwise. (Tr. 26-27)

(In reply to Mr. MacKenzie) When capital expenditure are involved, it is necessary for the operating officials of th Utah-Idaho Central to consult the Board of Directors, a ver large percentage of whom are local residents of the State o Utah. The Company has never in its history received advance from any other railroad carrier or any department or branc of the United States Government. (Tr. 27-28)

The rail and bus lines that have been mentioned are owne and controlled by the same corporation. The bus em
618 ployes are men who have operated on the railroad, an have interchangeable seniority with the rail operation (Tr. 28)

Exhibit No. 4 received in evidence without objection. (Se Court Exhibit No. 4) This exhibit is a description of the pur pose and method of operations of The Utah-Idaho Central. A indicated in the history of the corporate development, the prop erty, as now exists, was practically completed in the latte part of the year 1915 and represents, as previously explained the joining together of individual small interurban railroad previously constructed in Cache Valley and in Weber and Bo Elder Counties. These roads were practically entirely finance by local citizens in the Northern Utah area who were collec tively interested in the various agricultural and agricultura manufacturing pursuits which are common to this section, suc as dairying and milk processing, sugar beet raising and suga manufacturing, canning, livestock, poultry, fruits, vegetable etc. These people were naturally also interested in the eco nomic, cultural and educational development of the variou small communities which are now contiguous to this interurba railroad. Their idea in the construction of the constituen properties, and in the later joining together of these pro erties into one line, was to furnish an easy, convenient metho of intercourse between these communities, and also to furnis a method of transporting the raw products grown in the are to the agricultural processing and manufacturing plants whic they developed within the area. This requirement could

best and most satisfactorily served by the construction of an interurban electric line, with its consequent frequent and rapid passenger service and its natural ability, by reason of its type, to provide a convenient and economical method
619 of moving raw products at frequent intervals, and over short distances, to the processing plants. (Tr. 29-30)

This type of service was and is distinctly within the physical scope of an interurban railroad, in that, as will be later shown, its entire physical construction was designed to accommodate small trains, rapidly moving, at frequent intervals, and it is a character of service not possible of being furnished by the ordinary steam railroad, in that a major requirement of steam railroad operation is long trains and a service largely influenced as to schedule by the availability of sufficient tonnage to approximate the rating of the power used. The continual development, in steam transportation, of larger power with its consequent longer trains and longer intervals between those trains, creates a physical condition which cannot be adapted to the type of service performed by an interurban railroad. To illustrate this point, such services as the following have been performed by The Utah-Idaho Central Railroad Company: The handling of raw milk from concentration points to condensories. This service must be performed with a minimum of time en route and a definite arriving time at the condensory to fit in with their daily evaporation program. This movement is generally accomplished with the power unit and one car, and usually entails special service. This Company has also performed a service of moving shelled peas from vineries to canning factories. In the canning of peas it is necessary, in order to preserve their natural flavor, that a minimum amount of time be consumed from the field to the cannery, peas being harvested in the fields, taken to the vinery for shelling, and moving in lug boxes rapidly into the cannery before either time or temperature can start the change in flavor. This
620 movement likewise was accomplished with one or two car trains and special service. Another typical interurban movement is the handling of ripe tomatoes in stock cars for movement into the canning factory, usually with special service. Large quantities of beets are handled from various loading stations in small trains to the sugar factories for processing. These are only typical of the type of service performed, and generally represent the transportation link of

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the industrial development contemplated as a unit by the same people who constructed the processing plants at the same time they constructed this interurban railroad. (Tr. 30-32)

Later on in the presentation an exhibit will be introduced showing the number of trains operated daily on this property, which in itself will present a more concrete picture of the frequency of service actually used in the operation of the property. Likewise there will be presented exhibits showing the large number of sidings and spurs available for the loading of raw products, and one showing the frequency of available passenger stops for the convenience of short distance interurban travel. The Company at the present time, in addition to the operation of numerous small freight trains, operates both one and two-car interurban passenger trains and gasoline motor buses. A distinctive feature in our interurban passenger operation, which tends to illustrate the type of service furnished the communities involved, is the transportation of school children. The providing of educational facilities in this section is through the location of high schools at central points, rather than in each community, and in the carrying out of this policy, at public expense students are brought from their home to these centrally located schools. Our interurban operation fits well into this plan, in that very large numbers of these students are transported by this interurban service, at a small cost, from their homes to these central schools, as will be shown in a later exhibit. This travel amounts to from 175,000 to 210,000 passengers per year, and is largely accomplished through the operation of short distance special school trains. The Company operates both an interurban bus service, generally paralleling its line of railroad, and a local bus service serving the Utah State Agricultural College at Logan. (Tr. 32-33)

621

For many years pick-up and delivery service has been rendered at all available points in connection with package freight. A daily package merchandise train is operated, *maing* a round trip from Preston, Idaho, and returning during the night hours. This train is powered by an interurban electric car constructed so as to make a large portion of the car available for the handling of package freight. Each car also, being equipped with refrigeration facilities for the handling of perishable commodities in summer weather, and with heating

facilities for their handling during the winter weather. The locomotive unit on this train is likewise sufficiently powered to permit the hauling of other cars of package freight. (Tr 33)

As will be shown in a later exhibit, a substantial portion of the mileage of the property lies on city streets and county roads. In the cities and towns of Mendon, Wellsville, Logan, Hyde Park, Smithfield, Richmond, Lewiston, and Preston, the main line runs on the principal business street. In the City of Ogden it comes within one block of the heart of the business district, and in the other communities through which the Company operates, their main line is on public streets in very close proximity to the principal business section. As has been shown in the previous exhibit, the right to occupy these city streets and to operate through these business districts is limited to an electric interurban operation, which in itself is a legal barrier against the operation of long freight trains or an operation of the same general character as that of so-called steam railroads. (Tr. 33-34)

(In reply to Mr. MacKenzie.) My experience in this State is that the steam railroads in the dairy section of Utah have never rendered a rail service of transporting fluid milk to the condensers. My experience is likewise that the steam railroad has never rendered the service of transporting raw peas to the canneries. The only service that they render, which I have mentioned here, is they render the service of transporting sugar beets to the factories. The difference in their type of service is that particular operation is that they usually spread their empties in the morning and go through at night with a very long train, making a simultaneous delivery of the entire loadings on their area, as distinguished from our type of operation of operating small units, furnishing additional units at practically any time of the day, and bringing the loads in in small trains and at frequent intervals. I think that the frequency of service is an outstanding difference between steam railroad operation and interurban railroad operation, and is the reason for the usual intensified development in the interurban territory, and the reason for the extraordinary truck development in steam railroad territory, as compared with its development in interurban railroad territory. I would not say that if the steam railroads could give better service, they would get more of the business. Steam roads are not physically constructed to give the type of service that is given by the interurban railroad.

consequently unless you have an interurban railroad
623 that is so physically constructed and operated to give that intensive service, it is an invitation to truck development. I think that is recognized all over the United States, at least the western part of the United States, that I am familiar with. I understand that some few railroads have experimented with a pick-up and delivery service for less-than carload shipments. I likewise understand that only in a very limited way is that service furnished in the State of Utah. There have been some discussions, over a period of years, that it might be furnished, but it is not furnished now except in a limited way. We have been furnishing it for quite a few years. (Tr. 34-36)

As a preliminary to the introduction of Exhibit No. 5, I might observe that this exhibit is one of a series which pictures to the Commission the physical construction and characteristics of this property, and is designed to show that physically there is such a transportion unit as an interurban railroad, and that it is a completely developed unit, carrying distinct physical limitations and characteristics, as distinguished from a steam railroad. This particular exhibit is a description of the motive power of the Utah-Idaho Central Railroad. We have in our larger locomotive units five 900 class freight hauling units. These are 50 ton Westinghouse electric locomotives, designed for 750-1500 volt operations. They are equipped with four Westinghouse 562 A-5 motors, with Westinghouse control. The next two descriptions of these locomotives are purely technical factory descriptions of the type. Under the heading on this exhibit, of "North-bound 900 Class locomotives," there is shown the factory rating of this locomotive over the various mileage sections of our railroad, the practical rating of the locomotive, the grade, and the degree of curvature. (Tr. 37)

I might explain the difference between the factory rat-
624 ing and the practical rating: The factory rating is a technical mathematical rating of these locomotives under the conditions produced by the curvature and by the grade. Obviously it is impracticable to take a power unit in a train and continue to increase or reduce its tonnage every few miles, in order to closely adhere to the factory or technical rating. The method of operation, and particularly on a line such as ours,

with such broken grades and sharp curvatures, is to determine a practical rating over which you can get the maximum efficiency with the facilities available. The effects of these ratings are graphed in a later exhibit, and, for the saving of time, I might omit going into the detail. (Tr. 37-38)

I will take, as an example of the difference between the factory rating and the practical rating, the first eight lines of the exhibit. It shows a fluctuation in the factory rating from a maximum of 1000 to a minimum of 250 tons, to a minimum of 230 tons, on the eighth line. That 230 ton minimum on technical mathematical rating is occasioned by the 2 per cent adverse grade for a distance of 1.7 miles. The practical rating of these locomotives for that entire distance is 550 tons, on the theory that if the locomotive is not operated to its maximum allowed limit, at each point available, it will produce a higher temperature in the motors. It is possible to operate, for short distances, the locomotive away beyond its maximum limit, because the short distances and the time involved does not produce a temperature injurious to the equipment. So years of experience have indicated to us that the practical rating of that locomotive from mile point 0 to mile point 20.4 is 550 tons. That same example, in various degrees, will take care of the difference between the practical and factory ratings. (Tr. 38-39)

We have the same information with reference to our
625 500 class passenger-hauling motor cars. The tonnage rating on these motor cars, insofar as passenger service is concerned, is not particularly important, in that our type of passenger service furnished calls for one and two-car operation, which is well within the limit of the power of the equipment. For our merchandise service it is the same class of passenger-hauling units with the different gear ratio. The tonnage rating on those units being important, in that it develops the amount of merchandise that can be hauled in one unit. However, those cars never being intended for heavy freight hauling, their power is quite restrictive, and on one particular portion, as indicated on page four, their north-bound capacity is only 90 tons. Their maximum capacity north-bound is only 175 tons. South-bound it has the same limit. (Tr. 39)

(In reply to Mr. MacKenzie) We have five 50-ton freight locomotives, two smaller 35-ton freight locomotives, and three similar to the 500 class car, which are the passenger type of

equipment, constructed and designed for the hauling of package freight. Those are the units I referred to in my general statement as carrying heating facilities in the winter and ice refrigeration facilities in the summer. The capacity of the locomotives is the tonnage limit set out on the bottom of page 1; and on page 2 and the top of page 3 the air capacity at the limits, the number of cars, over these grades, no matter what the tonnage is. To give an absurd example but illustrative, if the cars only average a ton apiece, the 35 cars would be 35 tons and considerably under the tonnage rating, but then restricted by the air capacity. I don't know of any occasion when we handle as high as 45 cars in a train. As will be later shown, our average is so much less than 45 that in seventeen years I know of no time we have handled that many. It would be hard for me to even assume anything approximating that. (Tr. 40-41)

626 (In reply to Examiner Steer) We very seldom operate our freight trains with more than one locomotive. We have had occasions where we have used, in emergency, a helper locomotive, but that is usually where it has been necessary to deadhead power, and we can add a few more cars on a train and cut in the extra power at the heavy grades; but it is not our practice. It is not economical, and we hardly think it is feasible. We have the physical situation. The length of our trains and the tonnage of our trains is restricted by other elements, that will be shown later, which would preclude us from just trying to get enough power to haul all the cars we could get. These practical ratings on cars, shown on Exhibit 5 are based on an average weight of 45 tons, on the theory that our trains would be made up of half loads and half empties, and we have endeavored to arrive at a reasonable average, through tests of various trains of the average gross weight of each unit in a train. If you are hauling a train of empties, it would have the capacity to haul a large number of cars up to the limitation of the air capacity, or as was just explained a moment ago. Our electric locomotives are inspected by the Interstate Commerce Commission. Exhibit 5 received, without objection. (See Court Exhibit No. 5.) (Tr. 41-42)

Exhibit 6 received in evidence, without objection. (See Court Exhibit No. 6.) Exhibit 6 is a list of the equipment owned by the Utah-Idaho Central, a brief description of the equipment, information as to whether this equipment is interchangeable

with steam railroads, and the reason, the exhibit shows,
627 that we have aggregated all seven locomotives—50 tons, 45 tons, which are not interchangeable with steam railroads, due to the fact they are interurban electric locomotives. The exhibit likewise shows we have two self-propelled express cars, two self-propelled merchandise cars, fifteen self-propelled passenger cars, all of which are not interchangeable with steam railroads, by reason of the fact they are interurban electric equipment. We have seven passenger-carrying trailers, which are not interchangeable, by reason of the fact that they are interurban type of equipment. In freight equipment we have two gondolas, one flat car of 20,000 capacity, twelve flat cars of 60,000, fifteen box cars, twenty-two ballast cars, three ventilated box cars, seven refrigerator cars, twelve stock cars, all of which are not interchangeable with steam railroads, because of their wooden construction and their lack of A.R.A. brake rating. We have one steel flat car which is interchangeable with steam railroads, and ninety-eight beet and coal gondolas which are interchangeable. Those ninety-eight cars were purchased in order to take care of local movements on our line, but are of a type of equipment that may be interchanged with steam railroads. (Tr. 42-44)

(In reply to Mr. MacKenzie) The Company interchanges standard equipment with the steam railroads with which it connects. We receive from them and return to them standard equipment, standard freight equipment. The object of this foreign line equipment is that it enables the company to do a much greater freight business than it could do with its own equipment. The foreign line equipment permits us to originate a substantial portion of the freight, which without the use of that equipment we would have to provide our own equipment for. (Tr. 44)

(In reply to Examiner Steer) Our freight traffic that
628 is interchanged with other railroads is handled in their equipment, or in foreign line equipment largely,—well, practically all except this one flat car might be interchanged or some of these coal gondolas might be interchanged. (Tr. 44-45)

Exhibit No. 7 received in evidence, without objection (See Court Exhibit No. 7). This exhibit is a statement of sub-station power on the Utah-Idaho Central Railroad. All our power

is electrical power purchased from the Utah Power & Li
Company, and received at four separate sub-stations, which
the source of our energy. This statement shows the equipm
of these various sub-stations, and it shows the limit load of
station, adjusted to the grade characteristics in the territ
contiguous or served by that sub-station. It indicates that
first South sub-station, on interurban operation, we have
500 K W motor generator set, which will carry a 500 ton lo
Our next station north, Mile Post 9, at Hot Springs, has
500 motor generator set which will carry a 550 ton load. O
next station, Dewey, Mile Post 36, at the foot of the Collins
Divide, is equipped with two generator sets of 500 ton capac
but the combined sets will only carry a 550 ton load; the r
son, of course, being that the heavy grade crossings imme
ately north of this station restrict its carrying capacity. T
last station, at Smithfield, Utah, Mile Post 75, has two mo
generator sets of 500 K. W. capacity, this station being locat
in a relatively level territory, and will carry a 1000 ton lo
I might explain a little further that when we say a 500 ton lo
at a station, or a 1000 ton load, it means that within the radi
that that station furnishes power, the aggregate freight a
passenger load, or the aggregate power load, combined, can
exceed more than an aggregate of 500 tons in all trains with
that radius. (Tr. 45-46)

629 Exhibit No. 8 received in evidence, without objecti
(See Court Exhibit No. 8). Exhibit No. 8 is a b
statement of the character of track construction on
Utah-Idaho Central Railroad. I might say that a disti
characteristic of an interurban railroad is light construct
designed for small trains and rapid movement, and it is
tinctly,—that is, an interurban railroad is a type of constr
tion that could not accommodate large trains or typical ste
railroad operations. This exhibit shows we have a main-l
mileage of 94.63 miles, 11.19 miles constructed with 65 pou
rail; 83.52 miles of 70 pound rail; and 2.26 miles of main l
with 85 pound rail. We have a branch-line mileage of 21
miles, of which 20.39 are constructed with 45 and 48 pound r
and .73 of a mile with 65 pound rail. We have an aggreg
mileage of 36.93 of sidings and spurs. Out of that aggreg
1.45 is 45 pound rail, and 26.19 is 48 pound rail, which is by
the substantial percentage of our entire siding mileage. T
balance is divided into 60 pound rail, 2.56; 65 pound rail, 3

70 pound rail, 2.0; 75 pound rail, 1.15; 85 pound rail .06. The heavier rails in the siding construction are all in the turn-outs. Of the total mileage there is only 11.3 miles of the railroad tie-plated. That is in the area of heavy curvature or lightness of the rail. In the main line the absence of tie plates and the extreme lightness of the siding rail would preclude any type of operation except what is distinctly an interurban operation of small trains, small motive power, light equipment, but it is perfectly adequate for the purpose of an interurban railroad, with some small trains, light equipment and frequent service. The railroad is built with 6 x 8 x 8 cross-ties, which are substantially smaller than those used in heavier transcontinental operation, and they are spaced at 2 feet centers. It is probably wider spaced than necessary in transcontinental steam railroad operations. (Tr. 46-48)

(In reply to Mr. MacKenzie) All the property is standard gauge. (Tr. 48)

(In reply to Examiner Steer) While some of the steam railroads going over the Rocky Mountains and over the Sierra Nevadas have as heavy, and possibly in one or two cases heavier grades, the combination of grade and curvature on our railroad is much more severe than the grade and curvature on the road paralleling us, or than is considered good practice, if it can be avoided, on transcontinental lines. Our maximum main line curvature is—I think our sharpest curve is 12 degrees, and we have quite a few 10's and 9's and 8's. We have some 10's reversing into 10's, which is a condition which is always avoided in steam railroad construction, where possible. (Tr. 48-49)

Exhibit No. 9 received in evidence, without objection (See Court Exhibit No. 10). Exhibit 9 is a list of spurs, sidings and passing tracks on the Utah-Idaho Central Railroad, showing their capacity in cars. The short-train type of service is a distinguishing characteristic of the interurban operation, and calls for frequent passing tracks and spurs, but of short capacity. It will be noted on the three pages which show the individual limits and the mile posts of these various spurs, the extreme frequency of their location, averaging approximately only one or two miles apart. On the last page it shows that the maximum length of any passing track or spur on this

railroad is 32 cars, with a minimum length of 2 cars. The average length of all is 16 cars. The size of those spurs is a definite limiting factor on the type of operation. It is perfectly adequate for interurban operation of our character, but is totally inadequate for a general steam operation. (Tr. 49-50)

631 (In reply to Mr. MacKenzie) That is under present-day conditions; and the same statement would be true under the operating conditions at the time this interurban railroad was developed—very practical at that time. I am familiar with the fact that in past years practically all of the steam railroads had sidings of 30 car capacity. I am also familiar with the fact that at the time this interurban was constructed, for years previously, the steam railroads were then hauling trains 60, 75 and 80 cars long. Today they are hauling them 125 and 150. At the time they were hauling 50, 60 or 75 car trains our sidings and spurs would have been totally inadequate for their type of operation. (Tr. 50-51)

Exhibit No. 10 received in evidence, without objection. (See Court Exhibit No. 11.) Exhibit No. 10 is a statement of the miles of main-line track located on the public streets and public highways along the line of the Utah-Idaho Central Railroad. In total it shows that the total mileage located on public streets and public highways is 20.64 miles, or 18.2 percent of the entire mileage. Briefly, going down the exhibit, only in the last column, there is .93 of a mile located on the public streets of Ogden, right into the main business section, as previously explained; and .8 of a mile in the city of Willard is on the public streets, in other words our entire mileage within the city; .46 of a mile in Perry; likewise our entire mileage. In Brigham City 2.02 miles is located on the public streets, and is our entire mileage in Brigham City. Honeyville, .19 of a mile located on the public street, and that is about the length of the public street. Likewise in Mendon, 1.07; and at Wellsville .88, that runs right through the business section; Hyrum .45; Millville, .60; Providence .53; and Logan, which is the

632 fourth largest city in the State of Utah, has 1.98 miles entirely lying on their main business section; Hyde Park .81; Smithfield 1.98; Richmond .72; Preston .68. On our branch lines—on the Plain City branch there is an aggregate of 4.79 lying on county highways. There are no cities involved on that branch. The Plain City Junction to Warren,

35; and on the Quinney branch 1.4 lies on county roads. Now, I might add that all of that 20.64 miles is restricted as to the character of operation, by our franchises, which is our only legal right to operate on this 18 percent of our mileage, and we are restricted there to an interurban operation and to the use of electricity. Lincoln Avenue, on which this road comes into the city of Ogden is one of the principal north-and-south highways within the city, being a business and residential street. In Logan our line is on Main Street, which is the principal street and might be called the only business street. We operate the entire length of the business area, and the balance is through prime residential portions of the same street. (Tr. 51-53)

(In reply to Mr. MacKenzie) No steam railroad operates over the streets as we do under our restricted franchises and type of operation. It is hard for me to conceive that the city of Logan, or any of these other cities, would permit a steam railroad operation over such streets. (Tr. 53-54)

Mr. Devine: It is true, Mr. MacKenzie, that steam railroads operate over city streets, but if you go back to the history of it you will find the railroad was there before the street was there. We will take Rock Springs, Wyo., for instance, or Evanston, Wyo., or a lot of the rest of those towns, and the railroads made the streets, not the streets the railroads. (Tr. 54)

633 I know of no steam railroad operating on the public streets or principal business streets in Utah under franchise. All of our limitations in this operation here are governed by the laws of the cities and of the muncipalities of the States of Utah and Idaho. (Tr. 54-55)

Exhibit No. 11 received in evidence, without objection. (See Court Exhibit No. 12.) Exhibit No. 11 contains photostatic copies of the blueprints or station plats of the Utah-Idaho Central, showing the restrictive curvature of turnout sidings and spurs. Likewise another limiting factor to railroad operation is the degree of curvature of its various sidings, turn-outs and spurs. An interurban railroad, by reason again of its small trains and its typical character of operation, can operate on a very much sharper curvature and sharper turn-outs than a steam railroad. Going through just a few of these as repre-

sentatives, we have our Ogden terminal, which is the southern terminus of this property, which you will note has turn-outs on the main line from 150 radius and 200 radius, that all the turn-out frogs are from No. 4 to No. 4-5/8. I am informed that the lightest turn-out frog used by the normal steam railroad is a No. 7 turn-out. You can move switch engines on a 150 foot radius, but I don't think any of the road power or equipment used by steam railroads could conveniently, or at least efficiently operate around such a curvature. On the first page of this exhibit the large blank space at the bottom is our passenger station, which adjoins this Federal building on the west. Our railroad terminal, which is sought to be declared a transcontinental railroad terminal, is located right here in this city block. (Tr. 55-57)

634 (In reply to Mr. MacKenzie) We operate standard steam railroad freight cars. We do not haul standard steam railroad passenger cars or standard steam railroad locomotives. In fact, I am informed by the engineer for the Southern Pacific that in order to accommodate the 2800 class Consolidated engine it would require a 22 degree curve or 260 foot radius, as against our 150 and 200. That is not because of the difference in the rod of the steam locomotive—it is the difference between the typical steam railroad and our railroad. Our curvature is built to accommodate the type of equipment that is peculiar to interurban operation. Their curvature and railroad are obviously built to accommodate the type of equipment that is peculiar to steam railroad operation. It is because of this type of construction that interurbans perform their intensive developing service, as contradistinguished from the rail transportation service performed by a steam railroad. (Tr. 57)

The next thing on this exhibit that I wish to call attention to is the lead to one of our interchanges with steam railroad, the Denver & Rio Grande. You will note that lead is a 29 degree curve, or 199 foot radius curve. The following one is a lead into the American Canning Company. That is possibly the sharpest curve on our railroad. It has a 100 foot radius curve leading off with a No. 4 frog, and a No. 4 frog, in order to refresh my memory, is a 150 foot radius curve. We lead off with a 150 foot radius and sharpen up to a 100 foot radius. There are some types of standard steam railroad freight equipment that it is difficult to get around this curve. (Tr. 57-58)

(In reply to Mr. MacKenzie) There isn't any that is barred, but there is some type that we may only take around on a single trip with a locomotive. We can't take it around coupled with any other equipment. For instance, some of the new, long box cars that are commonly used for handling cans. They are about the type of automobile cars. They have a big car in order to get this light material in it. (Tr. 58)

The fourth sheet in this exhibit is our shops and freight yards. I might call your attention to the fact that the entire leads into the shop and freight yards are accomplished with No. 4 turn-outs, which are 150 foot radius. The entire turn-out to these yards, which are to our main freight yards and our shop facilities, the leads are No. 4 frogs, which is 150 foot radius, with some 4¾, which are slightly less than a 200 foot radius, with only one 5½, and that 5½ is the 338 foot radius curve. Again, this property is restricted even in its entrance to its repair facilities and its freight yards, where the trains are made up, to equipment that will successfully pass over sharp curvature. On sheet 5, at Harrisville, we show a restricted curvature down to a radius of 190 feet, and another one with 231, with a maximum radius of 359 feet. There is no type of freight equipment barred. The restriction is on the power unit. At Willard, Utah, No. 6, the restriction there is No. 4 frog, which is 100 foot radius, and also a curve turn-out with 150 foot radius. No restrictions on freight equipment, but definite restrictions on power equipment. To make that a little clearer, you must use power small enough that you can't haul large trains; you must haul small trains. And that is definitely interurban. At Brigham we have a No. 5½ frog, but the curvature itself is 150 foot radius. No restrictions on freight equipment, and the same explanation on power. The fruit growers' spur at Brigham has 176 foot radius curve.

At the Brigham yards, which is one of the larger stations on our railroad, all of the leads into the Brigham yard are 150 foot radius curves, and all of the frogs are No. 4 frogs, which likewise is 150 foot. No restrictions on freight equipment, and the same restrictions on power. (Tr. 59-61)

At the Dewey yards—and this is a little more important than the others, because on this railroad we only have Wye's, one located at Ogden, one located at Dewey, one located at Logan, and one located at Preston. This wye is the one available at

the south end of the Collinston Divide. The wye is restricted as a turn-out to a No. 4 frog or 150 foot radius and on the curvature of the wye itself for 176 foot radius. It is impossible for us to wye any equipment here that will not accommodate itself to that curvature. It does not impose a restriction on freight equipment, but it imposes a very definite restriction on power equipment, and likewise it requires the use of snow-fighting equipment which will accommodate itself to this curvature. This is the station south,—immediately north of which we have our maximum snow condition or snow trouble. If I might state, while it is in my mind, I would like to correct that statement and add there is another wye on the other side of the hill at Mendon. All of the physical conditions would preclude the use of such snow-fighting equipment as used on transcontinental roads, requiring rotary equipment. The wye at Mendon is on the other side of the Collinston Divide. It is restricted in the turn-out to a No. 4 frog, which is a 190 foot radius. The curvature itself is sharper, 176 foot radius, and carries the same limitations and restrictions as explained in reference to Dewey. (Tr. 61-62)

At Wellsville we are restricted there to a 39 degree
637 curve, or a 150 foot radius. At Hyrum we are restricted to the sharpest curve, 231 foot and 236 foot. At Providence, Utah, 287 and 295. These curves reverse into each other. At Logan, Utah, which is the largest city, with the exception of Ogden, on our line, and in which we operate along the main business section, we turn off of the main business section on a 245 foot radius. Our Logan yards have no turn-outs lighter than the No. 4 frog. We have one that is sharper, 3-5/16, and the No. 4 frog means 150 foot radius. The Logan yard likewise has curves, other than the frogs themselves, as sharp as 136 foot. There is a wye at Logan, on the extreme right of the exhibit, which on both sides or both legs of the wye is 100 foot radius or 60 degree curve. That is as sharp as the curve at the American Canning Company. On this curve there is some type of freight equipment that is extremely difficult to wye on the 100 foot radius. If there is any binding action at all it will tend to climb. (Tr. 62-63)

(In reply to Mr. MacKenzie) There is no restriction on freight equipment at Wellsville and Hyrum and Providence; I mean by that the freight cars themselves. On this wye at Logan

you not only have to be careful to go around the curve at slow speed, but if you have long cars, with heavy loads, you have to take them around singly. They are not at the present time barred from going around there, but it is a very definite limitation that is peculiar to a railroad built with sharp curves. If you had fifty of them you would have to take fifty trips around there to get the train out. (Tr. 63)

That necessity for single-car handling on long box cars is only where the degree gets below 150. With our type of motive power, and with very slow movement, we can accommo-
638 date trains of the size we haul on most any curvature from 150 up. When you get down to 100 it is a definite trial. The next sheet is an amplification of an extension of the Logan yards, which shows restrictions there, No. 4 frogs universally, a curvature of 141 and 195, the flattest curvature being 287, with several of them considerably sharper. There are no restrictions on freight equipment. The next one is the North Logan spur, which has a 187 radius and 31 degree curve. The next one is Smithfield, Utah, which has only a 33 degree, 150 foot radius curve. The main lead from the main line being a 115 foot radius, at that curve also we have very definite trouble with long, high box cars. They have to be moved generally one car at a time. Otherwise no restrictions on the freight equipment itself, but the same limitation on motive power. The next, at Smithfield, is the pea factory spur, 287 foot radius, a relatively flat curve for this railroad. The next one is sheet 1 of the Richmond milk spur, which has the sharpest curve, 199 foot radius, or 29 degrees. Sheet 2 has a 231 foot radius. There are no definite restrictions on freight equipment in connection with the pea factory spur, the Richmond milk spur, and this Richmond farm spur. At Lewiston, Utah, the controlling curvature there is the No. 4 frog, which is 150 feet radius, and flattens out to 231 feet on the curve itself. At Preston, Idaho, the first sheet of Preston shows a 287 foot radius, but somewhat restricted by a No. 4 frog, which is 190 foot radius. The second sheet of Preston shows the Preston wye, which on the north leg is 199 foot radius and on the south leg is 287 foot. Of course, the use of the wye, for wye facilities, is restricted to the curvature on the north leg, or 199 feet, and the No. 4 frog for turn-out. The Preston yard has en-
639 tirely No. 4 frog or 150 foot radius, and the curvature is generally, with the exception of the south leg of the

wye, is generally from 150 to 199 foot radius. There are no definite restrictions against the use of freight equipment at Lewiston and Preston. (Tr. 63-66)

(In reply to Examiner Steer) Referring to my comparisons of the physical conditions on our railroad with the trunk-line railroads, such as the transcontinental railroads, I think the situation would be similar if you compared the Utah-Idaho Central with a steam railroad of similar or comparable length and size. Unquestionably the contrast would not be as sharp, but outside of narrow-gauge steam railroads the type of power used, the type of service furnished, I think you will find the same general distinction between interurban construction and interurban operation, between a smaller steam line and a larger steam line, or between a small steam line and an interurban railroad and a steam railroad, the difference being, the larger the steam line the sharper the contrast. I think they are two separate and distinct transportation units. I think there is as much difference, Mr. Examiner, between an interurban railroad and a steam railroad, which possibly is doing the same thing, possibly, to some extent, the same general result, as there is between a steam railroad and a truck line, which is likewise doing the same general thing but doing it in an entirely different manner. I think that you might say that there are three general classes of transportation agencies—the truck lines, the interurban railroads, and the steam railroads. You might add a fourth class to those steam railroads, like service to the logging interests, or plant facilities, that are distinctively single industry units. I think they are on an entirely different basis from any of the other three. (Tr. 66-67)

Exhibit No. 12 received in evidence, without objection.
640 (See Court Exhibit No. 13) Exhibit No. 12 is a detail of the grade breaks on the main line of the Utah Idaho Central, showing the mileage, location, the elevation, the length of the grade and the degree of ascent or descent. A typical characteristic of an electric interurban railroad, as contradistinguished from even small steam railroads, is that large sums are not spent to eliminate grade breaks; and a characteristic of those lines is many breaks in short distances. That, as will be shown in the next exhibit, is a very definite limiting factor on the operation, and suggests what you might say exists on an operation purely of the type performed by an interurban road.

st to briefly go over this, you will notice between—well, in
first grade, say the first ten miles of the railroad, there are
elve grade breaks, both as to descent and ascent. In other
rds, in laying out an interurban railroad you make no
ort to put in heavy fills or heavy excavations. You follow
nerally, within reasonable limits, the contour of the country.
the next ten miles of the railroad there are eight grade
eaks, both ascending and descending; and going right on
rough the exhibit, your picture is generally the same. This
hibit will be more sharply brought to your attention in the
xt one, which is the condensed profile of the road, and is in-
oduced largely to support the profile. (Tr. 67-68)

(In reply to Mr. MacKenzie) That 4.77 grade about the
iddle of page 2 runs right in the center of the main business
ction of the City of Logan. The grade is so heavy because it
necessary to conform with the construction on the main
reet of the municipality. The railroad has to conform to
e city grade. (Tr. 68-69)

Exhibit No. 13 received in evidence, without objection.
1 (See Court Exhibit No. 14). This exhibit is a con-
densed profile of the Utah-Idaho Central Railroad, and
posed on that profile is the locomotive tonnage curve, both
e factory rating and actual. The purpose of this exhibit in
dition to showing the profile and the frequent and sharp
eaks in the profile of the railroad, is to show the practical
fect of that type of construction, which is peculiar to elec-
ical interurban railroads, on their ability to move tonnage.
is is an eight-sheet exhibit carrying the mileage progressively
each sheet, from Ogden north. The first sheet shows the
st 10 miles, with grade breaks from a minus of 93 to a plus
1 percent, with twelve pronounced breaks in that 10 miles
road. This shows a technical factory rating from 11 to 22
rs, and a practical rating, north-bound, of 12 cars. South-
und it shows a practical rating of 14 cars. On the extreme
ght-hand side of the exhibit it shows the tonnage that those
rs represent, 45 tons being taken as the average weight of
ch car. The second sheet shows from Mile Post 10 to 22,
d shows north-bound a practical rating of 12 to 14 cars;
uth-bound a practical rating likewise from 12 to 14 cars. The
ade breaks in these 12 miles run from a minus of 2 degrees to
plus of 1.90, the minus and plus being figured on the north-

high bound operation. Sheet No. 3 of this exhibit goes from Mile Post 22 to 34. In these 12 miles there are only 4 substantial grade breaks. The practical rating runs, north bound, from 22 cars down to 17, and south-bound from 22 cars to 6.
642 The reason for the sharp difference south-bound is on account of the extreme curvature against them. The third sheet is 34 to 46. That is starting over the Collinston Divide. It shows a minimum grade of .58 plus and a maximum of 2 degrees plus to the summit, which starts down on 2 per cent descending. The practical rating north-bound on this sheet is 12 cars up to Mile Post 36 plus, which is Dewey, and 5 cars beyond. South bound the practical rating is 12 cars. The limitation on that rating is the ability to hold the train under control down-hill with the type of motive power available. Sheet 5 is from Mile Post 46 to 58. It shows the descending grade minus 2 percent down to the bottom of the hill, with 12 pronounced grade breaks from a minus 1.1 to a plus 2 degrees, in a distance of slightly less than 8 miles, with a car limitation as low as 12 cars north-bound and 8 cars south-bound. Sheet No. 6, from Mile Post 58 to 70, which shows grade fluctuations from a minus of 1.4 percent to a plus of two percent, with 10 pronounced grade breaks which affect traffic in those 12 miles. Sheet No. 7 is Mile Post 70 to 82, and grade fluctuations from a minus of 2 percent to a plus of 1.80, with 12 pronounced grade breaks in those 12 miles. Sheet No. 8 is from 82 to 94, and grade fluctuations from a minus of 2 percent to a plus of 2 percent, and 10 pronounced grade breaks in those 12 miles. Sheet No. 6, to correct my previous statement, goes from a minus of 1.98 percent to a maximum of 4.77 percent plus. This exhibit generally indicates the broken grade line on the railroad, and its restrictive effect on the size and tonnage of trains which may be hauled. (Tr. 69-72)

Exhibit No. 14 received in evidence, without objection.
643 (See Court Exhibit No. 15). This exhibit is a statement of the number of passenger trains, passenger buses, and freight trains operated over the Utah-Idaho Central Railroad for the years 1932, 1933 and 1934, and the average number of trains, buses and freight trains operated daily. The purpose of this exhibit is to show the frequency of service, characteristic interurban railroad service. It shows, in substance, that during the year 1932 this Company operated an average

daily number of passenger trains of 9.7, an average daily number of buses of 4.1, and an average daily number of freight trains of 6.6; the freight trains running from a minimum of 3.6 to a maximum of 11.3; the passenger trains from a minimum of 7.8 to a maximum of 10.8. During the year 1933 a daily average passenger trains was operated to the number of 11; passenger buses to an average of 5.6 and freight trains to an average of 9.1, with minimum freight trains of 5.7 and maximum of 14.2. During the year 1934 the average daily passenger trains was 11.5, passenger buses 4.1 and freight trains 7.7 with a minimum of freight trains 4.4, and a maximum of 14.7. (Tr. 73-74)

Exhibit No. 15 received in evidence, without objection. (See Court Exhibit No. 16). This exhibit is a statement or list of the passenger stations on the Utah-Idaho Central Railroad, showing the mileage of each station from Ogden, the mileage as between the stations, and the population of the cities and towns on the line. This statement shows that in a total mileage of 107 miles there are 73 passenger stops, or an average of approximately a stop every mile and a half. In the third column of the exhibit it shows the distance between the preceding stops. You will note from that column that the Maximum distance between any two passenger stops is 3 miles, and there
644 are only 5 instances where that maximum distance is involved; the balance of the distance between stops being from one-half mile to a mileage of a mile and a half and two miles. This is distinctly an interurban characteristic, and represents a type of passenger service just, as you might say, grown-up from street car service. This a type of passenger service designed to make stops frequent enough to take care of every small settlement of houses. On the last column of this exhibit it shows the population of the cities and towns served. There is no effort in this exhibit to show the rural population. It shows the population of Ogden 40,272 people; Willard 561; Brigham 5093; Honeyville 494; Dewey 275; Mendon 434; Wellsville 1571; Hyrum 1869; Millville 403; Providence 1088; Logan 9979; Hyde Park 723; Smithfield 2353; Richmond 1140; Lewiston 1783; Preston 3381; Plain City 806; Warren 203. In addition to those populations, of course, there is the rural population that is tributary to these various passenger stops, which is not available from any census. (Tr. 74-75)

(In reply to Mr. MacKenzie) The letter "F" opposite the stations named indicates flag stops. At a good many of these stops there are sidings of spurs or buildings, and at a good many of them there are not. A good many of these places are school stops and main-line stops at road crossings, designed to furnish interurban service to the small community of families; the theory of the flag stops on the interurban being quite similar to the stops on street-car lines: If the passenger is at the corner the street-car stops; if not, it goes on. (Tr. 76)

Exhibit No. 16 received in evidence without objection (See Court Exhibit No. 17). This exhibit is a statement of the passengers handled by the Utah-Idaho Central Railroad,
645 the amount of passenger fare, and the average fare per passenger, for the years 1931, 1932, 1933 and 1934. It shows that in the year 1931 a total of 489,650 passengers were handled, for a total fare of $89,632. In 1932 a total of 407,507 passengers were handled for a total fare of $67,410, or an average fare of 25.2 cents. In 1933 a total of 366,442 passengers were handled, for a total of $61,429, an average of 23.4 cents. In 1934 a total of 408,634 passengers were handled, for a total fare of $61,346, or an average of 20 7 cents per fare. This statement illustrates that the average fare per passenger during this four-year period was from 20.7 cents to 29.6; again illustrating the interurban characteristic of the property, that of short haul passenger traffic at a low average fare per passenger. (Tr. 77-78)

(In reply to Mr. MacKenzie) The statement does not include any revenue received from the Ogden Rapid Transit Company. The Company does not participate in inter-line passenger service with steam railroads. We do not sell tickets on our line on interchanges with the steam railroad. We handle United States mail and also express shipments. They are handled on our passenger trains. (Tr. 78)

Exhibit No. 17 received in evidence, without objection. (See Court Exhibit No. 18.) This exhibit is a statement of passengers handled by the Utah-Idaho Central as between regular passengers and school students, for the years 1931, '32, '33 and '34. In a previous exhibit I have explained to the Commission the type of school service provided by this Company in the transportation of students from their homes to centrally located high schools. This exhibit shows that in the year 1931,

out of total passengers handled 489,650, 210,490 were school students handled in the manner previously explained. In 1932 out of a total of 407,507 passengers, 185,154 were school
646 students. In 1933, out of a total of 366,442 passengers, 174,379 were school students. In the year 1934, out of a total of 408,634 passengers, 175,599 were school students. (Tr. 79)

Exhibit No. 18 received in evidence, without objection. (See Court Exhibit No. 19.) In the previous series of exhibits we have brought out the various physical and operating characteristics on the Utah-Idaho Central Railroad that are unique to an interurban electric line. Now we propose, in a series of exhibits, to compare the conditions and results as with steam railroads, or part of the general steam system of transportation. Exhibit No. 18 is a statement showing the capacity of sidings, based on a 50 foot per car, on the various steam railroads operating out of Utah, for the first 200 miles from their Utah terminal; this information being obtained from their official timetables. In the similiar exhibit previously introduced with reference to the Utah-Idaho Central Railroad it showed an average length of sidings of 16 cars. This exhibit shows that the Los Angeles and Salt Lake Railroad, on the first 200 miles from the Utah terminal, has a total length of 87 cars, or about five and a half times the average on the Utah-Idaho Central Railroad. The Southern Pacific Railroad has an average length of 114 cars, or about nine times the length on the Utah-Idaho Central Railroad. The Oregon Short Line has an average length of 86 cars, or about five and a half times the length on the Utah Idaho Central Railroad. The Union Pacific has an average length of 109 cars, or about seven times the Utah-Idaho Central Railroad. The Denver & Rio Grande has an average length of 86 cars, or approximately five and a half times the average length on the Utah-Idaho Central Railroad. (Tr. 80-81)

Exhibit No. 19 received in evidence, without objection.
647 (See Court Exhibit No. 20). This exhibit gives selected operating statistics of the steam railroads in Utah connecting with the Utah-Idaho Central Railroad, and also that same information for the Utah-Idaho Central. This statement is designed to show the relative size of trains, and also the relative labor costs per car-mile for enginemen and trainmen. The general purpose of this exhibit is to more clearly illustrate

the fact that all of the limiting physical characteristics that have been shown in the previous exhibits, and which are unique and distinctive to an interurban railroad, are definitely reflected in their operation, as compared with the operation of the general steam railroads. They are limited to the point that they restrict the number of cars per train, and consequently put a higher labor cost per car-mile on an interurban railroad by reason of its physical limitations, than is true on steam railroads. (Tr. 81-82)

The first page of Exhibit No. 19 shows that for the years 1931 to 1934 the Union Pacific Railroad had an average of freight cars per train-mile, or in other words, an average length of freight train of 62.9 cars to 65.4 cars. That figure can be mentally contrasted with our substation ability to handle tonnage, with our locomotive ability to handle tonnage, with our side-track capacity, and with our physical road-bed type of construction. This exhibit likewise shows that the cost to the Union Pacific per car-mile per engine-man and train-man service in those four years ranged from a low of .56 cents per car-mile to a high of .64 cents. To more clearly develop the picture I am turning to the last page of the exhibit,
648 which shows the same information with reference to the Utah-Idaho Central Railroad, and shows that the average length per train, during the four-year period, on the Utah-Idaho Central Railroad, per freight train, was from 5.6 cars to 6.3 cars, as compared with the Union Pacific 62.9 to 65.4 cars, or possibly ten times greater length. It shows that the average cost per car-mile for engine-men and train-men on the service on the Utah-Idaho Central Railroad ranges, in the four years, from 2.59 cents to 3.1 cents, as compared with the Union Pacific, .56 of 1 cent to .64 of a cent. In the second half of the Union Pacific statistical review it shows the average length of their passenger trains, ranging from 9.4 cars per train to 10.8, while the average length on the Utah-Idaho Central Railroad ranges from 1.1 cars to 1.3 cars. The average cost per car-mile of engine-men and train-men service on the Union Pacific ranges from 2.65 to 3.14 cents, as compared with the Utah-Idaho Central 4.24 cents to 5.1 cents. On the Oregon Short Line the average length of trains ranges from 46.7 cars to 50.8 cars, as compared again with the Utah-Idaho Central of 5 to 6 cars. The cost on the Oregon Short Line was from .92 of a cent to .98 of a cent, as compared again with the Utah-

Idaho Central 2-½ cents to 3.1 cents. In passenger service the Oregon Short Line ranges from 7.1 cars to 7.7, as compared with 1.1 on the Utah-Idaho Central. Their passenger cost per car-mile for engine-men and train-men service was 3.7 to 3.98, as compared with the Utah-Idaho Central 4.2 to 5.1. The Los Angeles route, the average length of freight trains was 44 to 47 cars, as compared with the Utah-Idaho Central 5 to 6 cars.

Their average cost for engine-men and train-men was
649 1.1 to 1.2, as compared again with our 2.59 to 3.1. Their passenger train lengths were 9.8 to 11 cars, as compared with our 1.1 to 1.3 cars. Their labor cost was 2.83 to 3.27, as compared with our 4.24 to 5.1 cents. The Southern Pacific, another steam line connection, has an average train length, during those years, from 52.5 to 56.1, as compared with our 5 and 6 cars. The Southern Pacific had a cost of 1 cent to 1.15, as compared with the Utah-Idaho Central 2.59 to 3.1. Their passenger average length was 9.4 to 10, compared with the Utah-Idaho Central 1.1 to 1.3. Their passenger labor costs, 3.14 to 3.53, compared with our 4.24 to 5.1. On the Denver & Rio Grande, the last of our steam road connections, the average length of train was from 45.1 to 48.6 cars, again compared with our 5 to 6 cars. Their costs were 1.03 cents to 1.17, again compared with our 2.59 to 3.1 cents. The passenger trains, their average 6.2 to 7 cars, compared with our 1.1 to 1.2. Their passenger train-men's costs, 3.72 to 4.09, compared with our 4.24 to 5.1. This statement clearly shows the entirely different operating characteristics of these two classes of transportation units. The exhibit further shows that limitations of the operating conditions on an interurban electric railroad are such that in freight operations alone the labor costs per car-mile on an interurban railroad is from 3 to 4 times greater than that on a steam railroad. (Tr. 82-85)

Replying to a question by the examiner as to whether any similar comparison had been made of the Utah-Idaho Central with steam railroads of comparable length, the witness said: I know of no steam railroads in this section of the country of comparable lengths. The short line development in our section is through electric operation. There are, however, the
650 many limiting characteristics of an interurban railroad that in my judgment would produce the same different comparisons, possibly to not the extent as shown here, between a short steam railroad and an interurban electric

railroad. Short steam railroads are not operated in an interurban manner. They have not got every feature of their general construction joining together to limit their type of operation and their carrying capacity. (Tr. 85-86)

A short steam line railroad is limited only by its track conditions and size of its power units. It does not make any difference what the power units are, on an interurban railway, on such an operation as the Utah-Idaho Central Railroad, independent of both the track conditions and the power units, there is an absolute limitation upon its capacity and operations. (Tr. 86).

(In reply to Mr. MacKenzie) Every exhibit which we have introduced has shown a coordinated construction program with a definite, clear view of accommodating interurban construction. In other words, I have shown you that starting at the foundation, you might say, the sub-station capacity on this railroad is no greater than the locomotive capacity, and if you endeavor to increase your locomotive capacity you will have to increase your sub-station capacity. I have shown you that the type of track construction is absolutely in harmony with the sub-station capacity and the locomotive capacity; that the length of sidings is absolutely in harmony with the capacity of the three units, the sub-station, the locomotive, and the track. I have shown you that in our method of operation and in the results of our operation we have operated up to that maximum interurban capacity. Now, you could take a short steam railroad and assume—yes, I think it is a fair assumption that it was not built to furnish a frequent short-haul interurban
651 service. It is not a graduated *stream*-line and all you need to do is to change the weight and type of your equipment. If some of your curves are a little sharp, you might have to flatten those. On an interurban railroad, or on the Utah-Idaho Central, as a typical interurban road, if we endeavor to change our type of transportation into the method used by steam railroads, used by the general railroad system, we would have to completely rebuild and replace first our source of power, our sub-stations; second, our grades; third, our curvatures; fourth, our weight of rail; fifth, buy new motive power; sixth, make our stations and sidings more accessible, change our standard No. 4 frogs, we will say, to No. 7; flatten all the curves in our communities; and we would have to move off such situa-

tions as we have in the paved street for two miles, approximately, on the paved street of Logan. We run right in the middle of the business section, and go over a 4.7 grade. We would just have to move off that street, and go out and buy a private right-of-way, or go on the outskirts of town. (Tr. 86-88)

Just one more word: The Examiner's question brings this to my mind. That is not a characteristic of steam roads, from what I know of steam roads. They do not operate on public streets. They are usually constructed to some specific industry. They are constructed in the nature of tap lines or belt lines. They are not constructed for an interurban, and do not have the general characteristics of an interurban, and are more flexible as to developing into a larger steam line. If we put heavier loads on, the first thing we will have to do is to change the weight of our rails, flatten our curves, put on tieplates, heavier ties with close plates, and in general reconstruct our railroad. We could construct it into a steam railroad if we rebuilt it entirely, or bought new equipment. (Tr. 88-89)

(In reply to Mr. MacKenzie) I think some of those
652 old obsolete locomotives, that were used many years ago, could operate on all of our main line, except for the fact that they would be barred by our legal prohibitions contained in our franchises, and except for the further fact that I don't know whether there are any of those small locomotives still in existence. (Tr. 89)

If we went into steam-railroad operation, we would have to entirely rebuild the line. (Tr. 89)

"Mr. MacKenzie: Then again I want to call attention to the fact that on a number of steam railroads they do operate through large cities, on city streets, by virtue of franchises granted by the municipalities; and more particularly I call attention to the Southern Pacific, operated for a considerable distance over Alameda Avenue in Los Angeles.

Mr. DeVine: That is true of California.

Judge Howell: But that is not the main street.

Mr. MacKenzie: Alameda Avenue is not a main street?

Mr. DeVine: It was turned over to the railroad..

The Witness: Our operation on the main street in Logan would be similar to an operation on Spring Street in Los Angeles, the relative comparison to the size of the city.

(By Mr. MacKenzie) May I ask, in connection with this, if the Denver & Rio Grande operates over any of these streets in Ogden or Salt Lake City?

653 Mr. DeVine: They cross over streets and they operate along certain streets that are now a part of the platted lay-out, but were platted and laid out after the railroad was in there.

Mr. MacKenzie: That is in Salt Lake City or Ogden?

Mr. Devine: In both places.

The Witness: And they are far removed from the residential district.

Mr. DeVine: There is no question about that at all; and in addition to that you will find spur tracks in Salt Lake City, and I am not sure but what in Ogden, on some public streets to serve industries.

In that connection I want to bring another statement here for the record, because I think the witness will testify to it. If he says it is not correct, it may be stricken from the record. Both the Southern Pacific and the Union Pacific are land grant railroads. The towns were built around those railroads. That was not quite true of Salt Lake City, although the old Utah Central Railroad—I think that was the name of it—was substantially the same thing." (Tr. 90-91)

Exhibit No. 20 received in evidence without objection. (See Court Exhibit No. 21).. Exhibit No. 20 has in mind the fact that there is such a thing as an electrified steam railroad. There is today, and has been for many years, in fact, back to and before the time that Congress began to exempt interurban railroads. This exhibit is comparative to No. 19, and the purpose is to show that an electrified steam railroad carries all of the characteristics of a steam railroad, with some additional efficiency by reason of the *elctrification,* and none of the pro-

hibitions and burdens of a purely interurban railroad, as such interurban railroad is physically constructed. These are the statistics that were available from the Chicago-Milwau-
654 kee St. Paul and Pacific, comparing their steam operation and their electrified operation. In considering this exhibit it is again suggested that the averages of the purely interurban Utah-Idaho Central be born in mind. In the years 1929 to 1938, excluding the year 1930, which was not available on the steam operation of the Chicago, Milwaukee & St. Paul, the average length per freight train was 40.3 cars per train to 45.8 cars. The average length on their electric operation was 50.8 cars to 72.6; again compared with the Utah-Idaho Central average of 5 to 6 cars per train. This comparison brings out that there are definitely electrified steam railroads, steam railroads and interurban railroads, and the result of their operation clearly classifies them. For the only years available, the engine-men's cost per car-mile on freight, on the Milwaukee steam, was 1.16; electric 1.01; as compared with 2.54 to 3.1 cents on the Utah-Idaho Central. In other words, the train and engine-men's labor cost on the Milwaukee electrified steam railroad was lower than on their steam railroad proper, and either one of them was only about one-third the car-mile cost on the interurban road. Going to passenger operations you have the same general picture. Their average length per passenger train, on their steam operation, 5.8 to 6; on their electric operation 8.6 to 10.9, and on ours 1.1 to 1.3. Their labor costs on their steam, per car-mile, passenger, 4.82; 3.08 electrified; against ours 4.24 to 5.1. (Tr. 91-93).

Exhibit No. 21 received in evidence without objection (see Court Exhibit No. 22). This exhibit is a graphic picture of the comparative freight-car miles per train-mile, or average
655 cars per train, or length per train, as reflected in the preceding exhibits. It also shows the comparative length between the Milwaukee electrified and the Milwaukee steam operation. On this graph I might direct your attention to the very small red column on the extreme right of each year, which represents the average length per freight train on the Utah-Idaho Central with the varying lengths from 45 to 73 cars in the larger columns representing the average length on the steam railroads and on the electrified railroad of the Chicago-Milwaukee. (Tr. 93-94)

(In reply to Mr. MacKenzie) The difference in the number of cars handled per train by our line compared with the others was not a result of the differences in the volume of traffic passing over them. It is the result purely of the difference in physical construction, which causes the limitation in size of train, as brought out in the condensed profile in the exhibit showing the capacity of power, in the exhibit showing the capacity of sub-station, and also a contributing factor is the typical interurban type of service, which calls for fast and frequent service of small trains. The size of our trains in this entire period is not limited to any material extent by the question of volume of business. If we had additional traffic on our railroad today, we would buy more locomotives of the same size. We would possibly install additional sub-stations with the same limited power factor; and instead of averaging ten freight trains a day, as is shown in a previous exhibit, or practically one every two hours, we might average twenty freight trains a day, or one every hour. The other alternative would be to build a new railroad, or build a steam railroad. But my judgment is that with the development in volume we would follow the alternative I have outlined. It would
656 be economically sound, because if we build another type of railroad we would lose our peculiar usefulness and value to the industries and the people in the valley, and possibly then lose some of our support. Just as it had happened on steam lines where they haven't interurban lines, that being the purpose, to hold the business to the railroads. (T. 94-96).

Exhibit No. 22 received in evidence without objection (see Court Exhibit No. 23). This exhibit is likewise a graphic picture of the statistics shown on previous exhibits, showing the average length per passenger train on the Utah-Idaho Central Railroad, as compared with the various steam roads and the Milwaukee steam and electrified operation; likewise the very small column in the extreme right of each, which is the length of the Utah-Idaho Central trains alone, from 1 to 1.2 cars per train, as compared with the larger columns representing the steam roads, the largest of which is the electrified section of the Milwaukee in 1933, which averages almost 11 cars per train. (Tr. 95-96)

Exhibit No. 23 received in evidence without objection (see Court Exhibit No. 24). This exhibit is a graphic picture of

the comparative cost of engine-men and train-men service per car-mile in freight operation, the Utah-Idaho Central Railroad, as compared with the other steam railroads, and showing for the year 1929 the same relative figure for the steam and the electrified operation of the Milwaukee. It is interesting, on this exhibit, to note that where in the average length of trains in exhibit 21 the Utah-Idaho Central column was a very small column, on the extreme right, when it comes to the cost per car-mile the Utah-Idaho Central is the largest column, on the extreme right, showing a length of from two and a half to three
657 times that of the steam railroads, or of the Milwaukee electrified section, indicating that by reason of the peculiar conditions on an interurban railroad their unit labor costs per car-mile for engine and train service are substantially greater than the steam road. To my mind, that, in itself, indicates an entirely different condition, an entirely different condition of employment, and entirely different type of service, and by no reasonable method could you apply the same type of labor regulations on an interurban railroad as is applied to a steam railroad. (Tr. 96-98)

Exhibit No. 24 received in evidence without objection (see Court Exhibit No. 25). This exhibit is the graphic picture of the comparative cost of engine-men and train-men service, per car-mile, in passenger service—the Utah-Idaho Central as compared with the steam railroads, and in every instance it shows a higher cost per car mile for passenger train and engine men's service than shown on the steam railroads, and a very substantially higher cost than on the electrified portion of the Chicago-Milwaukee & St. Paul. (Tr. 98).

(In reply to Mr. MacKenzie) I have not prepared any exhibit showing the comparative costs on the steam roads and our property for the operation of branch lines. Our costs include our branch-line operation and I assume their costs include theirs. If we compare the branch line operation of the steam railroad we should compare the branch-line operation of our railroad. We will have the same relative disparity between size of trains and operating costs on our branch lines as compared with our main line, as a steam road would have between their main line and their branch lines. I might go further and
658 say that from personal knowledge the length of trains is considerably larger on the branch lines of the steam railroads in Utah than on the main line of our railroad.

Their branch lines have not the physical restrictive conditions that our main line has, obviously, because they were built for steam operation, and we were built as an interurban, and still are. The Oregon Short Line operates, to my knowledge, some one-car units for passenger service on branch lines; also to my personal knowledge they operate 35 and 40 and maybe larger freight-car units on those branch lines, in freight operations. I might state that their one-car unit in their passenger operation was dictated by decreasing traffic. The small unit in our passenger operation was dictated by all of the limiting factors; available power, type of construction, type of equipment, and those physical limiting factors that caused our property to be a one and two-car operation property, when business was substantially better than it is today, and at that time the Oregon Short Line were operating large passenger units on their branch lines. So their one-car unit in passenger service is a matter of meeting the falling business, and ours is now and always has been limited by physical construction. (Tr. 98-100).

As a matter of fact the Oregon Short Line and the Union Pacific System generally, where they have put the one-car unit in, went in and asked permission to do it, upon the sole ground of falling business. And they got permission from this Commission to do so, as well as permission from the State Commission. (Tr. 100).

Exhibit No. 25 marked for identification. The Utah-Idaho Central Railroad Company, under its then name—The Utah-Idaho Central Railroad Company then—was in existence in 1918, at the time of Federal control of railways. As my recollection goes, the original proclamation of the President
659 or the Director-General left some question as to the type of railroads that should be under Federal control. However, from the time of the original proclamation, the Utah-Idaho Central Railroad received no orders, directions, benefits or instructions from the Director-General of Railroads; and subsequently, some very few months after the original taking over, or the original proclamation, we were definitely notified by the Director-General of Railroads that the Utah-Idaho Central was not under Federal control, and continuing to the termination of Federal control we never were under Federal control, or never received any instructions, restrictions, or received any of the benefits of Federal control. (Tr. 100-101)

(In reply to Mr. MacKenzie) I don't understand that the general classification of the railroads that were not taken under Federal control were the so-called short lines. My opinion of the reason that the Utah-Idaho Central was excluded is because it was essentially an interurban railroad and was not a part of the general steam railroad system of transportation, the preservation of which the Government felt to be necessary in order to advance its military activities. (Tr. 102)

It is my recollection that when an application was made, or inquiry was officially made by the company, that I was so instructed. I have not been able to locate the original order. I did endeavor to get a copy of that order from Washington. I did obtain from the files there a photostatic copy of the order. And the original, so far as I know, or the part that came to the Company at that time, has been either lost or destroyed a long time past. Exhibit No. 25, which is a photostatic copy of the order as it appears in the files, received in evidence without objection (see Court Exhibit No. 26).

Exhibit No. 26 received in evidence without objection, and a copy thereof is hereto attached. Exhibit No. 26 is a statement of the revenues on the Utah-Idaho Central Rail-
660 road for a nineteen-year period—from 1916 to 1934. As has been previously testified, construction on the Utah-Idaho Central Railroad, and the completion of the almagamation of the constituent interurban lines, was completed along about in the latter part of 1915. 1916 was the first partial operating year, and 1917 it could be considered that the property really got into full operation. This exhibit shows a segregation of this revenue as between the various classes of revenue prescribed by the Interstate Commerce Commission, namely, passenger revenue, package revenue, mail and express revenue, milk revenue, freight revenue, switching revenue, miscellaneous revenue, and revenue from other railway operations. This exhibit, in addition to giving the earnings for the various classes of business, definitely shows that there has been no change in the character of the operations or the purpose of this property, from the time it was originally amalgamated out of the street-car lines and small interurban lines. The outstanding characteristic of this exhibit, of course, is the very sharp decline in passenger revenue. The passenger revenue, as you will note, started in 1916 from a peak of 246,000, and in 1920

reached a peak of 448,000, and then declined over the period to 1934 to 61,346. The reaching of that peak, and the subsequent decline, is in no way due to any different character of railway, or different character of operation, but due entirely to the well-known element of the increase in the number of privately-owned automobiles and the construction of wide, well paved highways, that furnish a more convenient method of transportation than either interurban lines or steam lines. Automobile travel between Ogden and Logan in the Cache Valley, on account of the highways, was extremely unpleasant up to about 1922 or '23, when the Sardine Pass was constructed. It was not only unpleasant but decidedly hazardous. Since that time the Sardine Pass has been constructed. That has provided a paved highway twenty miles shorter than our railroad, and it is that, and the increase of the privately-owned automobiles, that has affected our passenger revenue, and not any change in our original characteristic of an interurban property. Now, the same general curve shows in the other classes of revenue, but they are of minor quantities, minor amounts, until we get to freight revenue. It is interesting to note that the freight revenue of this Company followed, to a large extent, the same general characteristic. (Tr. 104-106)

In 1916, the first year of its operation, and the year that it did not get into a full swing, by reason of the completion of construction, its freight revenue was $173,000. In 1917, the first real year of freight revenue, it was $255,000. That likewise went to a peak in freight revenue, in 1920, of 506,000, fluctuating back and forth with economic conditions, crop conditions, and various other outside influences; but not at all limited or controlled or extended by any different than the original interurban type of operation; that they ended up in the year 1934 with $378,000 freight revenue, as compared with the peak, in 1920, of $506,000. Our passenger revenue has declined to a greater extent and more constantly by reason of competitive automobile conditions, and our freight revenue has responded to economic growth and market conditions; but this chart of revenue clearly shows that there has been no important change in our type of operation; that we are the same interurban line that we were when we were rejected from Federal control; that we are the same interurban line that we were when we were built

out of our constituent units. It is also true that the
662 purely local character of our freight originating over the territory we have, being agricultural in character, it includes fruit, and that we have not a constant year-by-year crop. Our fruit crops are subject to weather conditions. Our general territory is subject to water conditions. At this time we have no extensive water storage, and our crop depends entirely upon the amount of precipitation stored in the watersheds during the winter; and the third element that effects it is the market. (Tr. 106-107)

(In reply to Mr. MacKenzie) After Mr. MacKenzie had pointed out that in 1916 the passenger revenue was $246,171.72 and the freight revenue was $173,982.46, or a difference of approximately $72,000 more passenger revenue than freight revenue; while in 1934 the passenger revenue was $61,346.25 and the freight revenue was $378,934, or about six time more than the passenger revenue, the witness testified: That is correct. As I explained, in 1916 was the first year of the operation under construction. As I explained in my opening statement, the purpose of the construction and amalgamation of this interurban railroad, which was built by the people who built the processing plants and agricultural manufacturing plants in the valley, was to give this section of northern Utah the benefit of the intensive development that interurban service would do; so naturally we would expect that from the time of the construction of this interurban line, and the imposition on the territory involved of the benefits of interurban service, that there would be a development in the territory, and that development would likewise be reflected in the revenues of the Company. Now, were it possible to wipe out all the area that served the good roads, and the passenger automobiles, and rep-
resent the personal travel of the people, peculiar to
663 the conditions that were necessary in this time you talk of, unquestionably we would have a situation where the passenger revenue would be a substantially greater percent of the gross than the freight revenue. In other words, the shrink in the passenger revenue has been due entirely to a condition that the method of operating this property had nothing to do with. The growth and fluctuation in the freight revenue,—what growth is there has been due to the benefit of an interurban

service and the intensive development it promoted. The fluctuation has been due to economic conditions, crops, markets, water, and so forth; and clearly there is nothing in the exhibit that does not tend to show that there has been no conversion or change in the type of operation of this railroad from the day it was built. It was an interurban railroad when it was built. It was an interurban railroad when it was rejected from Federal control, and the very curve shows it is still an interurban railroad, and still operated with the same interurban characteristics. During the year 1933 a total of 6,494 carloads of freight originated on the Utah-Idaho Central. Of that total, 3394 were delivered to steam-line connections; 103 to interurban electric line connections; and 2997 were local, that is originated and moved locally on our line. During the year 1934, out of a total of 5554 carloads originated, 2814 were delivered to steam-line connections, 143 to interurban electric line connections, and 2,597 cars local. The freight that was delivered to the steam-line connections was not all interstate traffic. A substantial portion of it might have been intrastate traffic. I might explain
664 that the function of an interurban railroad in an agricultural community is quite similar to the function of a truck line, to pick up the raw product, take it to the processing plant for processing into the final marketable product, then we perform the next service of a gathering line or a tap line, a distinctly interurban service. We take the equipment of the steam line and we load it with the condensed milk, the manufactured sugar, or what not, and deliver it to the connection; our hauls sometimes being as small as eight or ten miles. The same thing is true of fruits and vegetables. Our frequent loading points and our type of service are advantageous for the producer of fruit and vegetables, to bring their commodities down to our rails, assemble them, or perform the feeding service to the transcontinental line for the long haul. (Tr. 108-111)

At the request of Mr. MacKenzie, the witness and counsel for the carrier agreed to furnish for the record a statement showing the number of carloads of freight originating on the property for the last six months of the year 1934, and showing destination by state and commodity; and also showing the cities in which these carload shipments originated that were delivered to the line during the last six months of the year 1934. The examiner gave permission to file such statement within 15 days, and it

was so filed and received in evidence as Exhibit No. 28 and a copy thereof is hereto attached. (Tr. 111-113)

(In reply to Mr. MacKenzie) We interchange l.c.l. shipments with connecting lines. (Tr. 113)

Exhibit No. 27 received in evidence without objection
665 (See Court Exhibit No. 27). This exhibit is an chronological history of existing labor agreements between the Utah Idaho Central Railroad Company, including its predecessor companies, and various crafts of employes. This exhibit shows that at the present time the Company has an operative existing labor agreement with Division 418 of the Amalgamated Association of Street Electric Railway Employes and Coach Operators of America. This association is an affiliation of the American Federation of Labor, and this agreement covers the wages and working conditions of all train men, shop men, barn men, and substation operators, and has been in existence continuously, except as amended or renewed, from May 25th, 1909, to date, and is still in effect. This labor agreement has never been beyond the stage of friendly negotiations for renewal or amendment. There has never been a strike under it, or a threatened strike, or request for arbitration. This Company also has with its station employes an agreement effective since May 1, 1934, and still in effect, that covers all employes in station service, and likewise has never been beyond the stage of friendly negotiation. (Tr. 113-114)

(In reply to Mr. MacKenzie) I am not familiar, particularly, with the Railway Labor Act, but the only thing I understand about it is some *year* ago a representative of your client formally advised us that by reason of the fact that we were under the Railway Labor Act, it would be necessary for us to enter into a labor agreement with the Brotherhood of Railway Trainmen, notwithstanding the fact that we had a valid labor agreement with an affiliate of the American Federation of
Labor. I haven't any further particular knowledge of
666 the Railway Labor Act, or what its provisions or directions might be.

"Mr. MacKenzie: * * * I don't know whether Exhibit No. 27 was accepted or not. It seems to me there is a question or whether or not that exhibit ought to be made a part of the hearing.

Exam. Steer: That was received without objection. I t
I will permit it to remain in the record for whatever it ma
worth.

Mr. Devine: So that there may be no oversight—this
been a rather long session and a lot of exhibits, as a ge
proposition, merely to correct any omission, if there is an
may be understood, I take it, that all of the Exhibits fro
to 27, which will include Exhibit 28 when furnished, wil
offered as a part of the record in this case?

Exam. Steer: Received.

Mr. DeVine: And received as a part of the record.

Exam. Steer: Yes." (Tr. 115-116)

(In reply to Mr. MacKenzie) This company particip
in through freight rates and through freight tariffs cove
the through movement of freight. It has no through passe
rates or through passenger tariffs with any railroad except
local intrastate interurbans in Utah. The tariffs cover p
tically all of the through rates named into the territory in w
we operate. The Company has filed individual tariffs u
the I.C.C. serial numbers. I think we possibly have thre
four that are in effect all the time. They have been reissued
supplemented. The Company is a participating carrie
tariffs and classifications issued by other lines or agents.
participate in the official classification. We particip
667 in all agency publications that affect the territory w
we serve, restricting these answers, however, purel
freight. The Company has additional powers of attorne
concurrences with tariff-publishing agents. They have
filed with the Interstate Commerce Commission, or the S
Railroad Commission. We participate in the divisions of t
bureaus. I doubt whether we hold membership in the bur
or not. I think generally small interurbans are not admi
to membership, but they are permitted to participate. We h
no off-line solicitors. We maintain solicitors, or I might
a solicitor in our own territory, but we have no out-of-st
off-line solicitors. We have no joint soliciting arrangeme
We expect to solicit our own traffic and find that is our bur
We observe the Hours of Service Law in train operation
the safety-appliance laws. There are no outside railroad

iers that have an interest in the property, either directly or indirectly, through any ownership or otherwise. At Ogden we have an interchange with the Bamberger Electric, an intrastate interurban. At Ogden we have also an interchange with the Denver & Rio Grande and the Union Pacific System and the Southern Pacific System. The Union Pacific System takes in their several units. At Brigham City we have an interchange, for switching only, with the Union Pacific. By "switching only" I mean in order to permit them to put loads to us for spotting at an industry that might be on our line, or vice versa. At Dewey we have an interchange with the Union Pacific System for the general handling of through business. At Hyrum we have an interchange with the Union Pacific System for the same purpose. (Tr. 116-120)

We are merely an originating and destination carrier and do not act as a bridge between other carriers. (Tr. 120)

(In reply to the Examiner) Our freight traffic that is 668 interchanged with the steam railroads generally moves on joint rates. The exhibit that I will file as No. 28 will show the proportion of the interchange traffic that moves intrastate and interstate. (Tr. 120)

Our line handles a closed pouch mail service, and we receive compensation for it on the basis fixed by the Interstate Commerce Commission for the payment of interurban railroads. We started handling mail in approximately 1919, and our rates have been fluctuating and changed with each new order of the Interstate Commerce Commission, fixing changes in mail pay rates for interurban railroads. And today we are operating under the interurban scale of pay as fixed by the Commission. This railroad was a party in the hearing before the Interstate Commerce Commission in regard to Electric Railway Mail Pay, reported 58 I.C.C. 455. It was subsequently, on rehearing, filed in 98 I.C.C. 737. (Tr. 121-122)

After the carrier had indicated that it desired a proposed report by the examiner and also oral argument before the division, the examiner announced that briefs might be filed by both sides on or before September 3, 1935, and closed the hearing. (Tr. 122)

21067 Defendant's Exhibit "A"

Interstate Commerce Commission

Railway Labor Act Docket No. 12

Utah Idaho Central Railroad Company

Submitted February 27, 1936. Decided March 18, 1936

The Utah Idaho Central Railroad Company's lines found not to constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934.

J. H. DeVine, J. A. Howell, and David L. Stine for carrier.

Ezra Brainerd, Jr., and D. A. MacKenzie for labor organizations.

Report of the Commission

Division 3, Commissioners McManamy, Porter and Miller

McManamy, Commissioner:

This proceeding was instituted at the request of the
670 National Mediation Board to determine whether the Utah Idaho Central Railroad Company is exempt from the Railway Labor Act as amended June 21, 1934, under the provisio to the first paragraph of section 1 thereof, which reads as follows:

Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

A hearing has been held at which evidence was introduced on behalf of the above-named railroad company, which contends that it is exempted by the priviso quoted, and its witness was cross-examined by a representative of the Brotherhood of Railroad Trainmen. Briefs have been filed on behalf of the parties named together with the Railway Labor Executives' Association, which joined the Brotherhood of Railway Trainmen in

opposing the railroad company's contention. Exceptions were filed by the carrier to the report proposed by the examiner, and the parties were heard in oral argument.

The Railway Labor Act as amended June 21, 1934, provides for the prompt and orderly settlement of disputes between the carriers and their employees. The first paragraph of section 1 thereof defines the term "carrier" as including among others any carrier by railroad subject to the Interstate Commerce Act which is followed by the proviso hereinbefore quoted. There is no question that the Utah Idaho Central is a carrier by railroad subject to the Interstate Commerce Act, except such sections thereof as contain exemptions somewhat similar to that here under consideration. This railway is operated by electric power, and none of its stocks or bonds are owned by any steam railroad. The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso.

In the first case arising under this proviso in the Railway Labor Act, Texas Electric Ry., 208 I. C. C. 193, division 6 said at pages 194, 195:

The amended Railway Labor Act does not indicate the purpose of exempting the class of lines referred to in the proviso to the first section. No reason is apparent for distinguishing between steam and electric power, and the act does not purport to exempt all electric lines. There are other reasons which may have influenced Congress, but we think the fundamental reason was that the lines exempted are essentially local in character and largely disassociated from the steam-railroad systems. This belief is confirmed by reference to the Congressional hearings preceding the passage of this act and other acts containing similar exemptions, which hearings are referred to in the briefs and oral argument of both sides.

Previous to the passage of the amendment to the Railway Labor Act on June 21, 1934, this Commission had rendered numerous decisions regarding the status of particular electric lines under somewhat similar exemption provisions in certain sections of the Interstate Commerce Act and other acts which we administer. These decisions recognized the existence of a class of electric railways which are more than street, interurban, or suburban lines, and which are sometimes referred to

as commercial railways operated by electric power. Perhaps the best description of what constitutes a street, interurban, or suburban railway was given in Rules for Testing Other Than Steam Power Locomotives, 122 I. C. C. 414, where the Commission said at page 424:

"It is well known that electric cars were at first confined to street service in cities and towns. Gradually the lines were extended to the suburbs. Next came the idea of extending the lines from city to city. These three steps gave rise to the terms street, suburban, and interurban electric railways. These lines were limited almost exclusively to carriage of passengers. They were built largely upon streets and public highways. The only material difference between street, suburban, and interurban lines was the extent of the lines. If the line extended from city to city it was termed in interurban although handling the same traffic and being operated in substantially the same manner as the street or suburban line. We think this is the usual conception of the interurban line today.

"Obviously the character of the lines may change without a change in the name of the operating company. The record here shows that the name of a carrier, whether it is called a railroad, traction system, interurban railway, or power and light company, indicates nothing as to the character of the line or the nature of the traffic handled. We must look to the substance of the matter. A line which today extends only between two cities, and is dependent upon passenger traffic for the bulk of its revenues, might properly be termed an interurban line. In a period of years it might through natural development or consolidation become a railway comparable with our steam railroads and still retain its original name. It would no longer, however, be an interurban railway in substance and in fact. There would be a point, although not definitely defined, where the line passed beyond the true interurban."

The Utah Idaho Central extends from Ogden, Utah, north to Preston, Idaho, a distance of 94.63 miles, with two branch lines of approximately 7 and 14 miles respectively. It also has 36.93 miles of siding, spur, and yard tracks, making a total of 152.68 miles of track. All of this is within the State of Utah, except about 6 or 7 miles in Idaho, and with the exception of Preston the points herein mentioned are in Utah. The principal cities

served, with their populations, are Ogden 40,272, Brigham 5,093, Logan 9,979, and Preston 3,381, and 14 other cities or incorporated towns are served, having a population ranging from 275 to 2,353 each. Almost all of the line is in the Great Salt Lake Valley and the Cache Valley, which are largely agricultural sections separated by a part of the Wasatch Mountains. This railway closely parallels the main line of the Oregon Short Line Railroad Company for about 40 miles north of Ogden, and it parallels a branch of the same trunk line for most of the remaining distance to Preston. The number of employees averaged about 150 in 1934.

The history of the Utah Idaho Central and its predecessors began about 1890, when 3 or 4 miles of street railway in Ogden were operated with horse-drawn cars. This property was acquired by the Ogden Rapid Transit Company in the late nineties, which marked the beginning of its electrification, rehabilitation, and expansion. During the same period in the late nineties, the Ogden & Northwestern Railroad Company built a line from Ogden to Hot Springs, 9 miles, which it operated with a small steam locomotive. About 1910 that line was also acquired by the Ogden Rapid Transit Company, which equipped it for electrical operation and extended it to Brigham, 21 miles from Ogden. Contemporaneously with this development between Ogden and Brigham, the Logan Rapid Transit Company built a street railway in the city of Logan, together with lines to Smithfield, about 8 miles north, and to Wellsville, 12 miles south, of Logan, all operated with electric power. In 1914 the Ogden Rapid Transit Company and the Logan Rapid Transit Company were consolidated into one corporation, the Ogden, Logan & Idaho Railroad Company, which built a connecting line from Brigham north over the Collinston Divide to the southern terminus of the Logan Rapid Transit Company, and also extended the latter's line northward from Smithfield to Preston. In the latter part of 1919, the street-car operations in Ogden and a suburban operation into Ogden Canyon were segregated from the other lines and have since been operated by a separate corporation, the Utah Rapid Transit Company, which is not involved in this proceeding. The name of the Ogden, Logan & Idaho Railroad Company was later changed to the Utah Idaho Central Railroad Company, a Utah corporation, and in 1926 the latter was reorganized as the Utah Idaho Central Railroad Company, a *Delware* corporation. In recent

years the company has established and operates a motor-bus service parallel to its railway, and it has substituted motor busses for the local street-car service in Logan. The railway was practically entirely financed by citizens of northern Utah, who have to a large extent retained their interest therein, and many of the employees have remained the same through the various corporate changes.

Approximately 81.8 percent of the railway is located on privately owned right-of-way, and the remaining 18.2 percent is located on public streets or highways. The latter includes from 0.19 to 2.02 miles in each of 15 cities and towns, or a total of 14.1 miles, and 6.54 miles of the branch lines are on county roads. In many, if not most, instances the line passes through the cities and towns on their main business streets, and the terminal in Ogden is near the business center. Some of the franchises to use the streets and highways were granted for a street railway, an interurban, or a street and interurban railway to be operated with electricity, compressed air, or liquefied air as motive power, but more of them were granted for the operation of a double-track or single-track railroad, generally with a restriction against the use of steam or other motive power which might scatter sparks or fire. In a few instances the use of steam power was not specifically prohibited, and one franchise authorized its use for the first 25 years, which have now expired. In 1926 the franchises were generally amended to include operation as a common carrier by motor vehicle.

The tracks are of standard *gage* with 80 miles of 70-pound rail and 11 miles of 65-pound rail on the main line, 20 miles of 45 to 48 pound rail on the branches, and 26 miles of 48-pound rail on the sidings and spurs, the remainder varying from 40 to 85 pounds for comparatively short distances. The ties are 6 by 8 inches and 8 feet long, spaced 2 feet between centers, and only 11.3 miles of the main line are tie-plated. There are 70 places on the main line where the grade breaks or changes, which is an average of nearly one to every mile. The maximum grade is 44.77 percent for one tenth of a mile in the city of Logan, which is necessary to conform with the grade of the street. Outside of that, the maximum grade is 2 percent at several places for an aggregate of 18.9 miles, most of which is encountered in going over the Collinston Divide. The line makes a long circuit in going over the divide, and the sharpest curve on the main line

12°. The most difficult curves are on the spur tracks where, in at least two instances, there are 60° curves with a radius of 100 feet. On such curves it is often necessary to switch the largest box cars one at a time, but there is no restriction here or elsewhere against steam-railroad freight cars. Steam locomotives, however, could not safely operate over many of the sidings or spur tracks.

The passenger trains consist of either one or two cars, which are self-propelled, and in 1934 they averaged 1.1 cars per train. There are 73 places on 107 miles of line where stops are made for passengers, of which 52 are flag stops. The number of passengers carried in 1934 was 408,634, of which 175,599 were students going to and from centrally located schools at public expense. The passengers handled by train and bus are not shown separately, but in 1934 the number of busses operated averaged 4.1 per day compared with a daily average of 11.5 passenger trains. No interline tickets are sold except in connection with other electric railways operating in Utah. The average fare paid ranged from 29.6 cents in 1931 to 20.7 cents in 1934. The passenger revenues have declined every year since 1920, those for 1934 being $61,346.25 compared with $448,184.01 in 1920. This has been due primarily to the steadily increasing use of private automobiles, together with the construction of paved highways, particularly one which is 20 miles shorter than the railway between points in the Great Salt Lake Valley and the Cache Valley. The passenger trains carry baggage, mail, and express, which in 1934 yielded $39.48, $2,660.33, and $5,931.50 respectively.

The freight traffic consists to a large extent of raw products such as sugar beets, milk, tomatoes, and peas moving to factories, canneries, or processing plants, and the manufactured products moving outbound from such plants to connecting railroads. A considerable portion of the raw-products movement requires special service with 1-car or 2-car trains. A daily package merchandise train is maintained with facilities for refrigeration in summer and heating in winter and with pick-up and delivery service at all available points. In 1934 all of the freight trains averaged 6.2 cars each, and the number of trains per day ranged from an average of 4.4 in March to 14.7 in October with an average of 7.7 throughout the year. During the last half of 1934, this carrier handled 6,354 carloads of freight, of which 2,226 were local and 4,017 were interchanged with other car-

riers. Of the interchange traffic, 2,075 carloads moved to or from points in Utah and 1,942 to or from points in other States. The traffic originated on this carrier moved to points in 31 States and that delivered by it was from points in 26 States. The commodities originated in greatest volume were beets, sugar, potatoes, sand and gravel, milk, canned goods, tomatoes, sheep, cans, and cattle; and those delivered in greatest volume were beets, coal, sand gravel, and rock, gasoline, ties, lumber, and poles, and cans. This carrier is a party to practically all of the tariffs publishing through rates to or from this territory, and its interchange traffic generally moves on joint rates. It does not perform any intermediate service between other lines.

The carrier owns five 50-ton electric locomotives and two 35-ton electric locomotives, which are used to haul its freight trains. In addition it has three self-propelled cars which have been constructed and equipped for hauling package freight and can be used to pull other cars when necessary. The largest locomotives have factory ratings ranging up to 1,000 tons on the main line, but their practical ratings are generally 550 to 650 tons, or 12 to 14 cars averaging 45 tons each, except at two or three places where such ratings are only 5 to 8 cars up grade. A helper engine is occasionally used, but that is not the usual practice. A train of empties might have a larger number of cars, but it would be subject to air-brake limitations of 30 cars on the principal grades and 45 cars elsewhere. Four electric-power substations have capacities ranging from 500 to 1,000 tons of load on their respective sections of the line. The carrier also owns 100 gondola cars, 22 ballast cars, 18 box cars, 14 flat cars, 12 stock cars, and 7 refrigerator cars; but only 98 of the gondolas and 1 flat car are interchangeable with the steam railroads, and the gondolas were bought for local service. Practically all of the interchange traffic is therefore handled in standard equipment furnished by connecting railroads. Interchange connections are maintained with all of the trunk lines reaching Ogden, also with the Bamberger Electric Railroad Company at the same point, and with the Oregon Short Line at several other points. There are 84 sidings, spurs, or yard tracks with capacities ranging from 2 to 32 cars and averaging 16 cars.

Freight has always contributed a large proportion of the revenues since the completion of the line in 1915. The freight revenues have exceeded the passenger revenues in every year

since 1918, the former being more than double the latter in 1926 and 1927, more than three times in 1928 and 1929, more than four times in 1930 and 1931, more than five times in 1932, and more than six times in 1933 and 1934. During the last five years, from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57, and the revenues from passsengers, mail and express totalled $448,941.62, which amounts were approximately 81.9 and 18.1 percent of the total revenues, respectively. The freight revenues reached a peak in 1920 and a somewhat higher peak in 1928, since which they have generally declined but not so much as the passenger revenues.

The carrier compares its lines with the steam railroads in various respects. Although some of the steam railroads have as heavy or heavier grades in crossing the Rocky Mountains and the Sierra Nevada, grades and curves such as this carrier has are always avoided on the transcontinental lines wherever possible. It is admitted that steam railroads also operate along city streets in many places, including Ogden and Salt Lake City, Utah, but they do not use any main business streets in Utah cities. The average capacity of the sidings on this carrier's lines is much less than those on the trunk lines within 200 miles of Ogden, which range from an average of 86 to 114 cars on the various lines. The average length of its trains is also much less than those on the same trunk lines, which in 1934 averaged from 7 to 11 cars in passenger trains and from 45.1 to 63 cars in freight trains. The average cost of operation in 1934 for enginemen and trainmen on the lines of this carrier was 5.1 cents per car-mile in passenger service and 2.59 cents in freight service, which figures are compared with corresponding costs on the trunk lines ranging from 2.64 to 3.74 cents per car-mile in passenger service and from 0.57 to 1.12 cents in freight service. Similar comparisons are made with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, where the average cost in 1929 for enginemen and trainmen in passenger service was 3.08 cents per car-mile on the electrified section and 4.82 cents on the portion operated with steam power, and the corresponding costs in freight service were 1.01 and 1.16 cents respectively. All of the carrier's comparisons were with trunk lines which handle a large amount of transcontinental freight and passenger business. It would be fairer to compare this carrier with steam railroads of similar size or with branch lines of the larger railroads. It is said that there

are no independent steam railroads of comparable size in Utah, but such railroads exist elsewhere, and there are undoubtedly branch lines in this same territory.

The carrier endeavors to distinguish its line from other electric railways which have been found not to be interurbans within the same exemption proviso of the Railway Labor Act in Texas Electric Ry., supra; Sacramento N. Ry., 208 I. C. C. 203; and Waterloo, C. F. & N. Ry., 208 I. C. C. 211. It is pointed out that the Texas Electric Railway performs an intermediate service between steam railroads, that the Sacramento Northern Railway is a subsidiary of the Western Pacific Railroad Company, and that the Waterloo, Cedar Falls & Northern Railway sells interline tickets, maintains off-line solicitors, and filed applications to issue securities under section 20a of the Interstate Commerce Act, which exempts interurbans. However, it does not appear that the physical characteristics of the Utah Idaho Central differ greatly from the above-mentioned electric railways, as disclosed by the reports cited. The maximum grades are 2 percent on the Texas Electric, 4.6 percent on the Sacramento Northern, and 6 percent on the Waterloo, Cedar Falls & Northern. Both the Texas Electric and the Waterloo, Cedar Falls & Northern have curves with a radius of 50 feet, and some of the curves on the Sacramento Northern are too sharp for steam locomotives. The percentage of this carrier's right-of-way that is located on public streets or highways is considerably greater than in the case of the Texas Electric and Sacramento Northern but slightly less than the Waterloo, Cedar Falls & Northern. The freight trains of the Utah Idaho Central average somewhat smaller than those of the other three carriers, but its freight revenue is a larger proportion of the total revenues than on any of the others.

The Utah Idaho Central is paid for carrying the mail at rates prescribed in Electric Railway Mail Pay, 58 I. C. C. 455, 98 I. C. C. 737, under an act applicable to "urban and interurban electric railway common carriers". The same is true of the other electric railways which have been found not to be interurbans within the exemption proviso in the Railway Labor Act, but the Commission has never determined the status of this or the other lines under the above-mentioned mail-pay act. During Federal control the Director General of Railroads

addressed a letter to the president of this carrier under date of June 29, 1918, which advised that: "Pursuant to the recommendation of the Regional Director, the Utah Idaho Central is relinquished from Federal control". Notwithstanding this letter, the carrier contends that it was never under Federal control, as no orders, directions, or benefits relative to such control were ever received. For the purposes of this proceeding, it is unnecessary to determine whether the carrier was under Federal control prior to June 29, 1918.

The carrier contends that the number, frequency, and smallness of its trains among other things stamp it as an interurban, but none of these were among the factors which division 6 said are the most important in determining whether an electric railway, is an interurban or commercial railway in Texas Electric Ry., supra, at page 202:

The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives, supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. In harmony with that and similar decisions, we are of the opinion that an electric railway which is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue, which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam railroads for transportation to or from points on their lines, a considerable portion there being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric power than of an interurban as that term is used in the exemption provision under consideration. Of course, there are many other circumstances and conditions which may have a bearing on the question, and some electric railways are of such an unusual character that their status might depend on other things, but we believe the factors referred to are generally the most important and should be given great weight where all of them exist together.

A petition to reopen that decision was denied by the Com mission on May 13, 1935. This carrier's traffic complies in every respect with the above-described characteristics of a commercial railroad operated with electric power.

The Utah Idaho Central was found not to be a street, suburban, or interurban electric railway within a similar exemption provision of the Locomotive Inspection Act in Rules for Testing Other than Steam Locomotives, 122 I. C. C. 414. The appendix to that report shows that this carrier's freight revenues were less than double its passenger revenues during the years for which the figures were there given, 1923, 1924, and 1925, whereas the present record shows that its freight revenue was more than six times its passenger revenue in 1933 and 1934. Such previous decisions relating to the status of the same carrier under a similar exemption provision should not be lightly departed from in the absence of changed conditions, and such changes as have taken place with respect to this carrier tend to confirm and strengthen the conclusion that it is not a street, interurban, or suburban railway. See Sacramento N. Ry., supra, and Waterloo C. F. & N. Ry., supra.

In Piedmont & N. Ry. Co., 211 I. C. C. 4, decided October 11, 1935, division 3 said at page 8:

Previous to the amendment to the Railway Labor Act on June 21, 1934, this Commission had passed upon the status of numerous electric railways under more or less similar exemption provisions in other acts administered by us. Those decisions recognized a class of electric railways which were regarded as more than interurbans and were sometimes referred to as commercial railways operated by electric power. The distinction between them hinged largely upon the amount and character of freight business handled, an interurban being considered primarily a carrier of passengers and its freight traffic largely local. When Congress authorized this Commission to determine the status of electric railways under the Railway Labor Act, which is not otherwise administered by us, it is reasonable to suppose that it did so because of our experience in passing upon such questions under similar exemption provisions in other acts. This may also be regarded as a pretty good indication that Congress used the word "interurban" in the same sense as the Commission had interpreted that term in its decisions.

In all of the Commission's decisions dealing with the status of electric railways under the same and similar exemption provisions, it has never found one, which derived so large a proportion of its revenue from freight as this carrier does, to be an interurban.

We find that The Utah Idaho Central Railroad Company's lines do not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, to wit:

Order of submission

Tenth Day, September Term, Monday, September 27th, A. D. 1937

Before Honorable Robert E. Lewis, Honorable Sam G. Bratton, and Honorable Robert L. Williams, Circuit Judges

This cause came on to be heard and was argued by counsel, Wendell Berge, Esquire, appearing for appellant Dan B. Shields; Nelson Thomas, Esquire, appearing for appellant Interstate Commerce Commission; J. A. Howell, Esquire, and Robert E. Quirk, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Decree

Thirty-second Day, January Term, Friday, April 1st, A. D. 1938

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be and the same is hereby affirmed.

United States Circuit Court of Appeals, Tenth Circuit

No. 1558—January Term, 1938

Dan B. Shields, Individually and as United States Attorney for the District of Utah, and the Interstate Commerce Commission, appellants

vs.

The Utah Idaho Central Railroad Company, appellee

Appeal from the District Court of the United States for the District of Utah

April 1, 1938

Wendell Berge, Special Assistant to the Attorney General (Robert H. Jackson, Assistant Attorney General, Leo. F. Tierney and Hugh B. Cox, Special Assistants to the Attorney General, and Robert L.

Stern, Special Attorney, were with him on the brief) for appellant Shields.

Nelson Thomas, Attorney (Daniel W. Knowlton, Chief Counsel, was with him on the brief) for appellant Interstate Commerce Commission.

J. A. Howell and Robert E. Quirk (J. H. DeVine, David L. Stine, C. D. Cass, and Neil R. Olmstead were with them on the brief) for appellee.

Before LEWIS, BRATTON, and WILLIAMS, Circuit Judges.

LEWIS, Circuit Judge, delivered the opinion of the court.

This case presents the issue whether appellee's railroad, on the procedure taken before the Interstate Commerce Commission prior to the institution of this suit or independently on the facts, was brought under and subjected to the Railway Labor Act of May 20, 1926 (44 State. 577), as amended by the Act of June 21, 1934 (48 Stat. 1185), in its relations to and its dealings with its employes. Heretofore its employes have never been members of railway brotherhoods on steam railroad lines. They have had their own labor organizations on appellee railroad and through them they have dealt with appellee as to wages, hours, and other conditions with which such organizations are usually concerned. That is true generally it seems with street, suburban, and interurban railroads. Appellee company claims to be an interurban electric railway company, and it and its predecessor have operated as such for approximately 20 years. It is a Delaware corporation. The termini of its railway are Ogden, Utah, on the south and Preston, Idaho, on the north. Its mainline between those points is about 95 miles. It has two short branches. It carries freight, baggage, express, and passengers. It passes through about fourteen towns and cities between Ogden and Preston. The four larger cities have a total population of 60,000. None of the others exceed 2,000. It runs frequent and rapid trains, both passenger and freight. It has restrictive franchises for its right to pass through the different towns and also franchises to operate on public highways in places. It has short sidings and spur tracks. It is standard gauge. It was built to develop and serve two valleys, a part of the Great Salt Lake Valley and the Cache Valley in northern Utah. It passes over the Wasatch Mountains to reach the Cache Valley and extends seven miles into Idaho. It makes frequent stops in serving the public in freight and passenger service, about one and a half miles apart on the average. Its owners built it to develop the resources of those valleys. Its grades and rails are not suited to steam railway trains. It and its owners have assisted in obtaining fruit and vegetable packing plants and canneries along its line. It has encouraged the production of sugar beets. It hauls these products to the plants and their output to steam railway lines for transportation to the general market. In summer some of its cars provide refrigeration and in winter heat. Its freight trains average six to seven cars, and its passenger trains less than two cars

Two high schools have buildings adjacent to its line, and it transports the students to and from them for a considerable distance. In 1926 it went into receivership in the United States District Court for Utah. A few years later it was taken out by reorganization and has since been operated in the same manner and in the same service that it had theretofore been operated. It was claimed and testified by those who have been closely connected with its operation for many years that it could not be operated as a steam railway without being reconstructed, and that it could not continue to operate as it had been operated with the additional burdens that would be placed upon it if it be made subject to the Railway Labor Act, because of those burdens. The record gives an exhaustive comparison between this road and steam railroads and expenses of operating them. Appellee's general manager for the past 15 years, who had held a position with the Southern Pacific for eight years before that, testified in great detail to increase in labor cost to appellee if its road should be brought under the Railway Labor Act. He said:

"It would be unfair and impractical, and in addition to that, your honor, if applied would have produced an increase in the labor bill that would prohibit us from continuing in existence."

Congress has full power of regulation over appellee. It has been an interstate carrier since the completion and operation of its road to Preston, Idaho. In its exercise of that power Congress may in its own judgment make different regulations applicable to interurban electric carriers from those applicable to steam carriers, or because of other material differences. It has done so, and that intention was exemplified in Section 1, First, of the Railway Labor Act. That section first gives a general definition of carriers subject to the Act, which is broad enough to include appellee, followed by the exempting proviso and then a grant of power to the Interstate Commerce Commission, thus:

"Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban elect'ic railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

The last sentence just quoted, conferring power on the Commission, was not in the original Act of May 20, 1926. It was added by amendment in 1934. It is plain that before the amendment appellee was exempt from the Railway Labor Act, because it was not engaged in doing either of the things that would have made it subject to the

Act. It continued after amendment to be a "line operated by electric power" and was not "operating as a part of a general steam-railroad system of transportation" etc. The Interstate Commerce Commission so found in its report on the hearing which it granted on the request of the Mediation Board. Among other things it said (214 I. C. C. 708):

"This railway is operated by electric power, and none of its stocks or bonds are owned by any steam railroad. The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso."

It further said:

"It (appellee's railway) does not perform any intermediate service between other lines."

This exhausted its power. Specifically, its only power was to determine "whether any line operated by electric power falls within the terms of this proviso." The proviso was not changed by the amendment, except, if at all, by enlargement of the words "any street, interurban, or suburban electric railway" to "any line operated by electric power." But the Commission misconceived, we think, the extent of its power by proceeding further. It closed its report by this finding:

"that The Utah Idaho Central Railroad Company's lines do not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragaph of section 1 of the Railway Labor Act, as amended June 21, 1934."

It did this on the proof before it that in the later years appellee's revenues for freight transportation had greatly exceeded its revenues for passenger transportation, and the Mediation Board accepted that finding as conclusive that appellee was thereupon brought under the Railway Labor Act in its relation with its employes. The Commission arrived at its conclusion solely on its own estimate of the facts and not because of any direct testimony that the line was not in fact an interurban electric railway. There was none, but there was direct, positive proof by at least one competent, qualified witness that it was at all times has been an interurban electric railway.

Thereafter appellee filed its bill in the court below against Dan B. Shields, United States Attorney for the District of Utah, in which it sought among other things a writ enjoining Shields from prosecuting it and its officers for claimed commission of crimes defined by the Railway Labor Act. The bill alleged that appellee brought the suit to prevent irreparable injury and damage to it and its business and property used in the transportation of persons and property and to restrain Shields individually and in his official capacity from threatened enforcement of fines and penalties under the Railway Labor Act; that appellee is engaged in the business of

operating as a common carrier an electric interurban line of railway between Ogden City, Utah, and Preston, Idaho, for the transportation of passengers, baggage, freight, and express between those points and intermediate points. There are allegations as to the construction of the road, first as street car lines in some of the cities through which it now passes and thereafter their acquisition, consolidation, and extension northward over the Wasatch Range to Preston, Idaho.

Those who undertook the venture were of that section. They also planned the location of canneries, processing plants for preserving vegetables and fruits for the market, and other developments of the two valleys.

Shields answered denying that the road is an interurban electric railway. He alleged that the Railway Labor Act creates a board known as the National Mediation Board and gives it certain powers, among them the power and duty to prescribe the form of notice to carrier employes as set out in Section 2, Eighth, of the Act, and that the board has prescribed the form of notice thus provided for, ordered that it be posted, and that if plaintiff-appellee fails to comply with said order and with certain other provisions of the Act it will be subject to prosecution for the penalties provided in the Act; that upon the request of that board proceedings were instituted before the Interstate Commerce Commission to determine whether appellee came within the provisio found in Section 1 of said Act; that the Commission had held a hearing on that request. Appellee was there represented and introduced evidence, and on March 18, 1936, the Commission handed down its decision in which it held that appellee's lines do not constitute a street, interurban, or suburban electric railway within the meaning of the exemption proviso"; that the Commission's determination is controlling unless made arbitrarily, is unreasonable or not based upon substantial evidence, and that the bill does not so allege; wherefore, he asked that injunctive relief be denied and the bill dismissed.

The Interstate Commerce Commission appeared in the District Court and filed petition to intervene as a defendant in the cause and to file answer and participate in the defense as fully as if named as a defendant. It was permitted to do so. The Commission alleged that pursuant to request of the Mediation Board made in accordance with the authority conferred on it by Section 1 of the Act as amended it instituted a proceeding for the purpose of determining whether the Utah Idaho Central Railroad Company was either a street, interurban, or suburban electric railway; that it accorded appellee a full hearing and a large volume of testimony was taken; that it determined the matter and served copy of its report on appellee; that its report contains its findings that appellee's line of railway does not constitute a street, interurban, or suburban electric railway within the meaning of the exemption; that its finding is supported by evidence; that it was not arbitrary, unjust, or contrary

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to the evidence or without evidence to support it; and that it did not exceed its authority. It denies certain allegations of unconstitutionality of the Act found in the bill.

The case went to trial in the District Court. At the close of the testimony, which was in substance a duplication of the testimony before the Commission, the Court made its findings of fact. A transcript of the testimony before the Commission was admitted in evidence before the Court. The Court reviewed the history of the road. It found that the resources of the territory traversed in the two valleys were wholly agricultural in character, and the only industrial development of which the territory has been and is capable is the construction and operation of processing plants to enable the products to reach the outside market, such as beet sugar factories, vegetable packing plants, milk condensing plants, pea canning plants, etc., and from the time of the construction of the interurban electric railway this industrial development has been fostered by collecting the raw products from the fields and delivering them to the processing plants located on its line, and delivering to those plants the necessary materials for such processing from outside the territory served by the plaintiff, such as coal, lime, etc., by transporting by means of its interurban the processed products from the processing plants and delivering them to the steam railroads for transportation to the outside markets; that by means of its interchange with steam railroads wholly as an initiating or receiving carrier without discrimination as to preference as to which steam railroad is used, plaintiff has also fostered the agricultural development of the territory by delivering to the farms such needed merchandise from the outside, and delivering from said farms to the outside market such agricultural products as could be marketed without being processed; that it has likewise fostered the social development of the territory by the transportation to and from the farms to the larger communities of people inhabiting the territory and especially in the transportation of the school children; that to meet these needs of the people appellee operates short, rapid trains run at frequent intervals and making frequent stops, in many instances where no agents are maintained, for the transportation of both passengers and freight, practically to and from the individual farms and to and from the processing plants and community centers to enable the products to reach the market either as raw or processed products; that the physical elements of plaintiff's railway, its motive power, its equipment, track construction, length of spurs and sidings, and its curvature and grades require operation peculiar to interurban electric railways, and that without a complete change of its physical elements and structures it could not be operated as steam railroads are commonly operated; that it is operated by electric power, known as an interurban railway, and ever since its construction it has been known as such; that it is not now and never has been operated as a part of a general steam railroad system of transportation, and never has been any part of the general steam system of transportation operated

by any other motive power; that none of its stocks or securities are owned by any steam-railroad system of transportation or steam railroad company, nor do any of the officers or agents of such a company have any control or voice whatever in its management or operation; that the Mediation Board has prescribed the form of notice provided for in the Eighth paragraph of Section 2 of the Railway Labor Act and ordered that it be posted as therein specified thereby demanding that all employes be thereby notified that all disputes between the carrier and them will be handled in accordance with the provisions of said Railway Labor Act; that plaintiff has not complied with said order and if plaintiff continues to fail to comply with said order and otherwise fails to comply with the provisions of said Act it will subject itself to prosecution for the penalties therein fixed, notwithstanding it is not as an electric interurban railway subject thereto; that if it does not comply it thereby admits that it is subject to the provisions of the Railway Labor Act and thus voluntarily submits itself thereto, and it will thus suffer immediate and irreparable injury and damage; that such compliance will result in demands for increase of wages and demands for rules and working conditions with respect thereto which the plaintiff is unable to grant because its financial condition will not permit it so to do without immediately impairing and ultimately destroying its ability to continue to operate and serve the public in the manner in which it has served it in the past; that plaintiff has never had any disputes with its employes which have not been amicably adjusted and notwithstanding it has continuously operated under contracts with organizations of its employes, which are independent of it, and in no wise under its control, as to pay, rules, and working conditions, because they will be influenced to abandon their present organizations and to join those organizations of employes on transcontinental steam railroads throughout the country on the promise that they will receive the higher or so-called steam railroad standard wages and the different so-called rules and working conditions prevailing thereon; that on the uncontradicted evidence in this cause as well as on the evidence before the Commission in its hearing the Court finds that plaintiff's railroad is operated by electric power, is known and is in fact, now and ever since its construction, has been an interurban electric railway as said term is used in and within the purview of said Railway Labor Act, and that the finding of the Commission that it is not such a railway is against and contrary to the law. The Court concluded as a matter of law that decree should go for plaintiff and directed the issuance of its writ permanently enjoining and restraining defendant Shields, both individually and as United States Attorney for the District of Utah, from initiating or prosecuting any suit or suits against the plaintiff, its officers, and agents based upon the alleged violation by them or any of them of any of the provisions of the said Railway Labor Act.

Paragraph Eighth of Section 2 provides that the carrier shall notify its employes by printed notices in such form and posted at such

times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employes will be handled in accordance with this Act, and in such notices there shall be printed verbatim in large type the Third, Fourth, and Fifth paragraphs of Section 2, thereby making them a part of the contract of employment between the carrier and its employes, and those paragraphs shall be a part of the agreement between employer and employes. The Tenth paragraph of said Section 2 makes it a misdemeanor on the part of the carrier, its officers, and agents to refuse and willfully fail to comply with the terms of the Third, Fourth, Fifth, Seventh, or Eighth paragraphs of the section, and upon conviction the carrier, its officers, or agents offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, and each day during which such carrier, its officers, or agents shall willfully fail or refuse to comply with the terms of said paragraph shall constitute a separate offense. It also makes it the duty of the District Attorney of the United States to prosecute such offenses on the application of the carrier's employes.

There is one other point to be noticed. When appellee's predecessor came out of receivership a few years ago it was reorganized and transferred to appellee company. To satisfy the indebtedness of the old company the new company issued its mortgage bonds to the amount of $2,000,000 and 20,000 shares of stock. The old company had made periodic reports to the Commission, and the new company informed it of its stock and bond issue. Correspondence ensued, and directions were given to it by the Commission as to the manner of keeping its accounts, particularly in readjusting them in the light of the accounts kept by the old company. The new securities were issued in the belief that it was an interurban electric railway. Had they been issued under Section 20a of the Interstate Commerce Act without the approval of the Commission, they would have been void. Paragraph (1) of said section provides:

"As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) * * *"

See United States v. Chicago, N. S. & M. R. Co., 288 U. S. 1, 7, 13, 14. Nothing was said by the Interstate Commerce Commission in their correspondence upon the subject as to whether or not the securities of the new company could only be issued with its approval without being void. The Commission must have then been of the opinion that appellee was an interurban electric railway. The uncontradicted evidence shows that it has always been known as such by the public. In our opinion both law and equity are with appellee. Affirmed.

WILLIAMS, Circuit Judge, concurring.

In Deitch v. Staub (6th Cir.), 115 Fed. 309, Section 1 of Act of Legislature of Tennessee, March 23, 1883, was under consideration, which contained the following proviso:

"* * * provided, that this act shall in no way apply to or affect corporations where suits have already been brought to declare their charters void, and shall have no effect on any kind of litigation or suit now pending against such corporation, for any purpose. * * *."

In the opinion of the court by Circuit Judge Lurton, afterwards Justice of the Supreme Court of the United States, it is said:

"* * * The primary and usual office of a proviso is to except something out of a statute which would otherwise be within it. Its use is to take special instances out of a general class. Suth. St. Const. Sections 222, 223; Gibbons v. Ogden, 9 Wheat. 191, 6 L. Ed. 23. * * *"

The effect of the proviso to Section 1 of the Railway Labor Act is to except or exclude from the term "carrier" any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but not to exclude any part of the general steam-railroad system or transportation now or hereafter operated by any other motive power.

The inclusion of "any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power" and the confining of the Interstate Commerce Commission to determine "after hearing" as to whether "any line operated by electric power falls within the terms of this proviso" restricts the Commission in the determination whether the Utah-Idaho Central Railroad Company, a street, interurban, or suburban electric railway, was operated as a part of a general steam-railroad system of transportation.

I concur in Judge Lewis opinion affirming the judgment of the lower court.

Barrow, Circuit Judge, dissenting.

Section 1 of the Railway Labor Act as amended—48 Stat. 1185—defines the term carrier to include any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. Immediately thereafter is a proviso that the term thus defined shall not include a street, interurban, or suburban electric railway unless it is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation then or thereafter operated by any other motive power. A provision follows that the Interstate Commerce Commission is authorized and directed upon request

of the Mediation Board or upon complaint of any party interested, to determine after hearing whether a line operated by electric power falls within the terms of the proviso. The eighth paragraph of section 2 provides that every carrier shall notify its employees by printed notices in such form and posted at such times and places as the Mediation Board shall specify that all disputes between the carrier and its employees will be handled in accordance with the terms of the act; and further that such notices shall contain verbatim the third, fourth, and fifth paragraphs of the section. The tenth paragraph provides that the willful failure or refusal of any carrier to comply with the terms of the third, fourth, fifth, seventh, and eighth paragraphs shall constitute a misdemeanor, and makes it the duty of any United States district attorney to whom a duly designated representative of the employees of a carrier may apply to institute and prosecute under the direction of the Attorney General necessary proceedings for the enforcement of the provision of the section.

Acting upon the request of the Mediation Board, proceedings were instituted before the Interstate Commerce Commission to determine whether plaintiff was an interurban electric railway within the meaning of the proviso contained in section 1. Following a full and fair hearing at which plaintiff was represented and introduced evidence, the Commission found and determined that the company was not such a railway. The Mediation Board then directed the company to post the formal notices prescribed in the eighth paragraph of section 2. It failed to comply with the order. Instead, it instituted this action against the United States attorney for the district of Utah, alleging at length that it was an interurban electric railway within the meaning of the exemption proviso and for that reason was not required to post the notices. It sought a declaratory judgment (1) that it was not a carrier as defined in the statute, but was an interurban electric railway, and (2) that it was not required to post the notices; and it sought an injunction restraining the United States attorney from instituting and prosecuting proceedings for violation of the act. The court found that, upon the evidence produced before the Commission, also upon the whole record made before the court, plaintiff was and is an interurban electric railway within the meaning of the exemption proviso; that the determination of the Commission that it was not such a railway was against and contrary to law; and that the United States attorney should be enjoined. But there was no express finding that the determination of the Commission was arbitrary, capricious, or unsupported by substantial evidence.

The Act of February 4, 1887, created the Commission and enumerated its functions. 24 Stat. 379. Section 14 provided that its findings made in connection with reparation due an injured party should be prima facie evidence of the facts found in any judicial proceeding; and section 16 provided that on a hearing in a judicial proceeding involving a lawful administrative order or requirement affecting

a carrier, the report of the Commission should be prima facie evidence of the matters therein stated. These sections were re-enacted without change in that respect in 1889—25 Stat. 855—and while they were in force the findings made in connection with administrative orders regulating rates, concerning discriminatory practices or other similar matters affecting carriers merely had prima facie effect in judicial proceedings. Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184; Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 648; Cincinnati, Hamilton & Dayton Ry Co. v. Interstate Commerce Commission, 206 U. S. 142 (154). But the language giving prima facie effect to the findings made in respect to such administrative orders was eliminated from Section 16 when it was amended in 1906. 34 Stat. 584. And no identical or similar provision has found its way into later enactments.

The effect of a finding made by the Commission since that change is not open to doubt. It is held by repeated decisions that determination of fact relating to rates, discriminatory practices, and similar matters affecting carriers is conclusive upon the courts if supported by substantial evidence, unless the action transcends the authority of the Commission or presents some other fatal irregula Interstate Commerce Commission v. Delaware L. & W. R. R., 220 U. S. 235; Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541; Interstate Commerce Commission v. Louisville & Nashville R. R., 227 U. S. 88; Atchison, Topeka, & Santa Fe Ry. Co. v. United States, 232 U. S. 199; Los Angeles Switching Case, 234 U. S. 294; United States v. Louisville & Nashville R. R., 235 U. S. 314; Pennsylvania Co. v. United States, 236 U. S. 351; Manufacturers Ry. Co. v. United States, 246 U. S. 457; Skinner & Eddy Corp. v. United States, 249 U. S. 557; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57; New England Divisions Case, 261 U. S. 184 (203); Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268; Virginian Railway v. United States, 272 U. S. 658; Standard Oil Co. v. United States, 283 U. S. 235; Florida v. United States, 292 U. S. 1 (12). A finding made by the Secretary of Agriculture concerning maximum rates for stockyards has like binding effect. That results from section 316 of the Packers and Stockyards Act as amended—42 Stat. 159, 7 U. S. C. A. 217—which provides that suits to restrain or annul orders of the Secretary are governed by the provisions relating to review of orders of the Interstate Commerce Commission. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38. It is further settled that since the Shipping Act closely parallels the Interstate Commerce Act, each having created an administrative agency to whose informed judgment Congress committed the determination of questions of fact on the basis of which the making of administrative orders is authorized, a finding made by the Secretary of Commerce after the authority to administer the Shipping Act had been legally transferred to him is similarly binding. Swayne & Hoyt, Ltd., v. United States, 300 U. S. 297.

The Interstate Commerce Commission is an administrative body [illegible] long experience in dealing with rates, classifications, discriminatory practices and other cognate matters relating to carriers engaged in interstate commerce. Congress enacted the Railway Labor Act with knowledge of that experience, and of the fact that the findings of the Commission made in connection with orders affecting such questions were conclusive upon the courts if supported by evidence, unless the action went beyond the authority of the Commission. With that background, Congress committed the determination of the question whether a railway is an electric interurban within the meaning of the exemption proviso in section 1, to the well informed judgment and recognized discretion of that administrative agency. It certainly was not the legislative intent that the determination should be utterly impotent and without effect when challenged by a dissatisfied carrier in a judicial proceeding to restrain the institution and prosecution of authorized actions for refusal to comply with the act after the determination has been made. No such idle and fruitless consequence should be lightly ascribed to the deliberate finding made upon careful examination and sifting of the facts by an informed agency of recognized discernment in that field, especially in wide departure from the effect of findings made by the agency under other enactments. On the contrary, the designation of the Commission as the agency to make the determination upon request of the Mediation Board or upon the complaint of any interested party, with requirement for a hearing, evinces a clear legislative intent by necessary implication that the determination should be conclusive unless it is arbitrary, capricious, or unsupported by substantial evidence, or the proceedings fall outside the authority of the Commission. Any other conclusion would be in sharp conflict with the recognized doctrine that a determination of facts made after hearing by an administrative agency clothed with power shall be final if supported by substantial evidence.

Where judicial review is invoked to determine whether a determination of the Commission or other administration agency constitutes the confiscation of property, the courts will exercise their independent judgment, but even in such circumstances appropriate regard should be given to the finding. St. Joseph Stock Yards Co. v. United States, supra. No question of that kind is involved here. The determination of the Commission was merely one of classification. Rates were not reduced, property was not valued, fair return was not fixed, and no other action of that kind was taken. The order of the Mediation Board merely directed the company to post the notices; it did not constitute confiscation of property. For that reason the case does not call for application of the rule requiring the exercise of the independent judgment of the court upon the question of fact submitted to the Commission.

Was the finding of the Commission arbitrary, or capricious, or made without substantial evidence to support it? The evidence pre-

caused little conflict. The line extending from Ogden to Preston is 84.3 miles in length, with two branches of approximately 7 and 14 miles, respectively. There are 36.93 miles of siding, spur, and yard tracks, making a total of 152.68 miles of standard gauge trackage, with 89 miles of 70-pound rail and 11 miles of 65-pound rail on the main line, 20 miles of 45 to 48-pound rail on the branches, and 26 miles of 48-pound rail on the sidings and spurs, the remainder varying from 40 to 85 pounds for comparatively short distances. The ties are 6 by 8 inches and 8 feet in length, spaced 2 feet between centers, and 11.3 miles of the main line are tie-plated. There are 9 places on the main line at which the grade breaks or changes. Outside the City of Ogden, the maximum grade is two per cent at several places for an aggregate of more than 18 miles, most of which is encountered in going over the Collinston Divide near the state line. The line makes a long circuit in going over the divide, and the sharpest curve on the main line is 12°. There are some curves on the spur tracks of 60° with a radius of 100 feet, and it is often necessary to switch the largest box cars one at a time on such curves, but there is no restriction there or elsewhere on steam-railroad freight cars. Steam locomotives could not operate safely over many of the sidings or spur tracks. The carrier owns five 50-ton and two 75-ton electric locomotives which are used to haul its trains. It also has three self-propelled cars which have been constructed and equipped for hauling package freight and can be used to haul other cars when necessary. The larger locomotives have practical ratings usually of 550 tons to 650 tons, which means that they can haul 12 to 14 cars averaging 45 tons each, except at two or three places where such ratings are only 5 to 8 cars upgrade. A helper engine is used occasionally, but that is not the usual practice. Electric power is purchased, and the company owns and uses four substations having capacities ranging from 500 to 1,000 tons of load on their respective sections of the line. The company owns 100 gondola cars, 2 ballast cars, 18 box cars, 14 flat cars, 12 stock cars, and 7 refrigerator cars; but only 98 of the gondola cars and 1 flat car are interchangeable with steam railroads. Most of the interchangeable traffic is handled in standard equipment furnished by connecting railroads. Interchange connections are maintained with all trunk lines reaching Ogden, with the Oregon Short Line at several places, and with the Bamberger Railroad Company at Ogden. The principal cities served, with their respective populations, are Ogden, 40,272, Brigham, 5,093, Logan, 9,979, Preston, 3,381, and 14 other cities or incorporated towns having a population ranging from 275 to 2,353. Eighteen per cent of the trackage lies in public roads or public streets. These thoroughfares are occupied under county and municipal franchises which in varying language provide that the motive power shall be electric energy and they contain other interurban limitations. The balance of the trackage is on private right-of-way. The line traverses the Great Salt Lake Valley and the Cache

Valley, being agricultural sections. The passenger trains consist of one or two cars which are self-propelled; and they averaged 1.1 cars per train in 1934. Stops are made at 73 places for passengers, of which 52 are flag stops. The average capacity of its sidings is less; the length of its trains less; the number and frequency of trains greater; the cost of operation for enginemen and trainmen more; the grades heavier; and the curves sharper than those of steam railroads. During recent years the company has operated motorbus service parallel to its railway. In 1934, 408,634 passengers were carried, of whom 175,599 were students going to or returning from centrally located schools. The number of passengers transported by rail and the number by bus are not shown separately, but the daily average of trains was 11.5 and the daily average of busses was 4.1. The average fare paid ranged from 29.6 cents in 1931 to 20.7 cents in 1934. The passenger revenues declined every year since 1920. They were $448,184.01 in 1920, and only $61,346.25 in 1934, the reduction being due primarily to increased use of automobiles and paved highways. Interline tickets are not sold except in connection with other electric railways in Utah. Revenues from transporting baggage, mail, and express in 1934 were $39.48, $2,660.30, and $5,931.50, respectively. The freight traffic consists to a very large extent in the transportation of sugar beets, milk, potatoes, and peas, moving to factories, canneries, or processing plants, and manufactured products outbound from such plants to connecting railroads. In 1934 the freight trains averaged 6.2 cars each, and the number of trains per day averaged 7.7. During the last half of that year, 6,354 carloads of freight were handled, 2,226 being local and 4,017 being interchanged with other carriers. Of the interchange traffic, 2,075 carloads moved to or from points in Utah, and 1,942 to or from points in other states. Traffic originating on the system moved to points in 31 states and traffic delivered to the company came from points in 26 states. Freight revenues have greatly exceeded passenger revenues in every year since 1918. They were twice greater in 1926, three times greater in 1928 and 1929, four times greater in 1930 and 1931, five times greater in 1932, and more than six times greater in 1933 and 1934. In 1930 to 1934, inclusive, freight revenues were approximately 81.9 per cent and passenger revenues 18.1 per cent of the total revenues. The company is a party to practically all of the tariffs publishing through rates to or from that territory, and its interchange traffic generally moves on joint rates, but it does not perform any intermediate service between other lines. It had an average of 150 employees during the year 1934.

The Interstate Commerce Commission had occasion to determine in at least two instances prior to the enactment of the Railway Labor Act whether a given railroad was an electric interurban. It held that while other elements should be given appropriate weight, one of the major factors in making the determination is the ratio of revenue derived from the transportation of passengers to that derived

from the hauling of freight, and that ordinarily where the latter substantially exceeds the former the railroad should not be classed as an electric interurban within the meaning of the Interstate Commerce Act. In re Proposed Control of Sacramento Northern Railway by W. P. R. R., 71 I. C. C. 653; Id. 79 I. C. C. 782; In re Application of Section 15a to Electric Rys., 86 I. C. C. 751. It must be assumed that Congress was familiar with these determinations and acquiesced in them when it provided in the Railway Labor Act that the Commission should determine upon request of the Mediation Board whether a given railroad was an electric interurban within the purview of the exemption proviso.

The question presented in Piedmont & Northern Ry. v. Interstate Commerce Commission, 286 U. S. 299, was whether the company was an interurban electric railway. Its standard gauge tracks were constructed of 80-pound rails. Slightly more than two per cent of the trackage was located in city streets and the balance was on private right-of-way; and the line usually went around cities rather than through them. The company owned 17 electric locomotives ranging in weight from 55 to 100 tons, and 287 freight cars which were regularly interchanged with steam railroads. Approximately eighty-five per cent of the total investment in equipment represented expenditures for locomotives and interchangeable freight cars used exclusively for the transportation of freight. Foreign line freight equipment of every kind flowed freely over the road. Freight trains usually consisted of 40 to 50 cars; and by doubling, 65 cars could be drawn in a train. Through and local freight trains were operated in the same manner as those of steam railroads. The company filed individual tariffs and it was a party to others. From the outset its freight revenues were large, while its passenger traffic progressively decreased. During the year ending June 30, 1929, its freight revenues were 94.5 per cent and its passenger revenues were 2.9 per cent of its total revenues. For 1929, 4.3 per cent of the total freight revenue arose from local freight and 95.7 per cent from interline freight. More than 80 per cent of the freight moving over its line was interstate and less than 20 per cent intrastate. It was held that the railway was of such importance in interstate commerce and rendered a service which was so predominantly devoted to the handling of interstate freight, and competed to such an extent with steam trunk line that it could not be said to be an interurban within the meaning of the provision in the Interstate Commerce Act in question. The controlling features which define an electric interurban and distinguish it from other types of carriers were delimited and blueprinted in this language:

"No difficulty is encountered in defining a street or a suburban electric railway. These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and

in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were constructed from time to time, to serve the convenience of two or more cities. But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads. It is clear that the phrase 'interurban electric railway' was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars. It cannot be said, therefore, that if a railway is operated by electricity and extends between cities paragraph (22) clearly and unequivocally exempts it from the Commission's jurisdiction."

It was held in United States v. Chicago North Shore & Milwaukee R. R. Co., 288 U. S. 1, that the carrier was an electric interurban within the meaning of section 20a of the Interstate Commerce Act, but there fast electric passenger traffic was the primary function of the carrier. Freight business was secondary and subsidiary when measured by car service and gross earnings. In 1930 and for several years prior thereto, about three-fourths of its revenue came from passenger traffic and about one-fourth from freight. The main terminals served only passenger and merchandise freight traffic. No facilities were maintained at the termini in Chicago and Milwaukee for receipt and delivery of carload freight. Connections for the interchange of such freight were provided outside those industrial centers. The facts there were substantially and decisively different from those presented here.

The majority takes notice of the fact that agencies of the government have treated the company as an interurban electric road. The method of accounting prescribed for railways of that kind has been used without complaint from the Interstate Commerce Commission. The company sold an issue of bonds without securing approval of the Commission and no protest was made; and the Postmaster General has dealt with it as such a railway in respect to the transportation of mail. But administrative classification touching other matters is not decisive, Piedmont & Northern Ry. Co. v. United States, supra; and inconsistency of the finding in question with those made on other occasions is not controlling. Virginian Ry. Co. v. United States, supra.

The finding of the Commission was not arbitrary, or capricious, or made without substantial evidence to support it. It is, therefore, conclusive upon the courts. The decree should be reversed.

United States Circuit Court of Appeals, Tenth Circuit

Clerk's certificate

I Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the District Court of the United States for the District of Utah, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals No. 1558, wherein Dan B. Shields, Individually and as United States Attorney for the District of Utah et al. were appellants and The Utah Idaho Central Railroad Company was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 12th day of April, A. D. 1933.

[SEAL]

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

By E. OLIVER CHRISTIANSON,
Deputy Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	5
Specification of errors to be urged	11
Reasons for granting the writ:	
I. The question involved is one of public importance which should be decided by this Court	12
II. The decision below is in conflict with numerous decisions of this Court	17
A. The scope of judicial review	17
B. The meaning of "interurban electric railway"	18
Conclusion	22
Cases:	
Application of Section 15A of the Interstate Commerce Act to Electric Railways, 86 I. C. C. 751	21
Butte, Anaconda & Pacific Ry. Co. v. *United States*, 290 U. S. 127	17
Bultfield v. *Stranahan*, 192 U. S. 470	17
Crowell v. *Benson*, 285 U. S. 22	17
Great Northern Ry. Co. v. *United States*, 277 U. S. 172	17
Hudson & Manhattan Ry. v. *Hardy*, 22 F. Supp. 105	14
In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad, 71 I. C. C. 653	21
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541	17
Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U. S. 299	13, 18, 22
Proposed Construction of Lines by Piedmont & Northern Ry. Co., 138 I. C. C. 363	21
Proposed Control of Sacramento Northern by Western Pacific Railroad, 79 I. C. C. 782	21
Railway Mail Pay: In the Matter of Application of the Illinois Terminal Company, 174 I. C. C. 796	21

90363—38——1

Cases—Continued. Page

Rules for Testing Other Than Steam Power Locomotives, 122 I. C. C. 414 21
Shoemaker v. *United States*, decided April 4, 1938 ..... 13, 18
St. Joseph Stockyards Co. v. *United States*, 298 U. S. 38 17
Symons & Hoyt, Ltd. v. *United States*, 300 U. S. 297 17
Texas Electric Ry. v. *Eastus* (N. D. Tex., decided June 4, 1936) 14
United States v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1 ..... 13, 18
United States v. *Village of Hubbard*, 266 U. S. 474 12
Virginian Ry. Co. v. *United States*, 272 U. S. 658 17

Statutes:

Carriers Taxing Act of 1937, 50 Stat. 435, 439; U. S. C. Title 45, Sec. 269 15
National Labor Relations Act, 49 Stat. 449; U. S. C. Title 29, Supp. II, Sec. 152 15
Railway Labor Act, 48 Stat. 1185; U. S. C. Title 45, Secs. 151–163 2
Section 1, First 3
Section 2, Eighth 4
Section 2, Tenth 4
Railroad Retirement Act of 1937, 50 Stat. 307, 317; U. S. C. Title 45, Sec. 228q 15
Social Security Act, Title II, 49 Stat. 620, 50 Stat. 317; U. S. C. Title 42, Sec. 410a 15

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General and the Interstate Commerce Commission pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on April 1, 1938 (R. 327), affirming a decree of the District Court for the District of Utah enjoining the petitioner Shields, United States Attorney for the District of Utah, from enforcing the provisions of the Railway Labor Act against respondent, and declaring that respondent is an interurban electric railway exempt from the Railway Labor Act.

OPINIONS BELOW

The District Court entered no opinion. The opinions of the Circuit Court of Appeals (R. 327–342) have not yet been reported. The opinion of the Interstate Commerce Commission (R. 314–325) is reported in 214 I. C. C. 707.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether and to what extent a determination by the Interstate Commerce Commission that a carrier is not an interurban electric railway within the meaning of the exemption proviso in Section 1, First, of the Railway Labor Act, as amended June 21, 1934, is binding upon the courts, and whether the courts may determine the question *de novo* without giving any weight to the decision of the Commission.

2. Whether the determination by the Interstate Commerce Commission, that the Utah-Idaho Central Railroad Company is not an interurban electric railway is arbitrary, capricious, or without substantial evidence to support it.

STATUTE INVOLVED

The section of the Railway Labor Act (48 Stat. 1185, c. 691, 45 U. S. C., § 151–163) primarily in-

olved is the proviso in Section 1 exempting cer-
ain interurban electric railways from the defini-
ion of carrier. Section 1, in so far as material to
his proceeding, reads as follows:

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing

whether any line operated by electric power falls within the terms of this proviso.

Section 2, Eighth, which is the only provision of the Act which the record shows respondent to be violating, reads as follows:

> Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Section 2, Tenth, which prescribes criminal penalties for the violation of Section 2, Eighth, reads in part as follows:

> Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both

fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *.

STATEMENT

On October 1, 1934, the National Mediation Board requested the Interstate Commerce Commission to determine whether the Utah Idaho Central Railroad Company comes within the terms of the proviso exempting certain electric railways from the operation of the Railway Labor Act (R. 40, 54, 266, 314). The Commission designated an Examiner to hold a hearing and take testimony, and a hearing was held in Ogden, Utah, at which testimony was introduced by the railroad company (Plaintiff's Ex. 49, R. 266–313). The proposed report of the Examiner was submitted to the carrier, exceptions were filed with the Commission, and oral argument held before Division Three of the Interstate Commerce Commission (R. 314–

315). On March 18, 1936, the Commission handed down its opinion (214 I. C. C. 707; R. 314–325), in which it found that the respondent was not an interurban electric railroad within the meaning of the exempting proviso.[1]

The report of the Commission and the evidence adduced before it showed that the Utah Idaho Central Railroad is an electric railway connecting points in Utah and Idaho. The main line is 94 miles long, and there are two branch lines, seven and 14 miles long, respectively. The principal cities served are Ogden, Brigham, and Logan, Utah, and Preston, Idaho (R. 316–317). The road carries freight, passengers, mail, and express (R. 319).

Respondent has many of the physical characteristics of an interurban railroad. Its tracks on the whole are of lighter weight (R. 284–285), its grades slightly steeper (R. 285), its curves sharper (R. 285), its stations and side-tracks more frequent (R. 285–286, 295–296), its motive power of less capacity (R. 281–282), its side-tracks shorter than is customary on trunk line railroads (R. 285–286, 215). Approximately one-fifth of its mileage is located in public streets or highways in cities, towns,

[1] The Commission found that none of the stocks or bonds of respondent was owned by any steam railroad, and that "The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso" (214 I. C. C. at 708, R. 315). This case does not raise, therefore, any question as to the relationship of respondent to "a" or "the" steam-railroad system of transportation.

and villages; the remainder on private right-of-way (R. 286–287). The passenger business of respondent is operated in the same manner as that of any interurban electric railway (R. 319).

But the respondent is predominantly a carrier of freight. Even when the road was first completed in 1916, freight revenues were substantial (I. C. C. Ex. 26, R. 229), and since 1918 freight revenues have exceeded passenger revenues (*ibid.*). During the five years from 1930 to 1934, inclusive (the last years for which figures were introduced in evidence), the total freight revenues constituted more than 80% of the total revenues of the carrier (R. 229, 321).[2] In 1934 passenger revenues were only

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[2] Exhibit 26, introduced before the Interstate Commerce Commission (but not before the court below except as a part of the record before the Commission, plaintiff's Ex. 49), shows that passenger and freight revenues from 1925–1934 were as follows (R. 229):

	Passenger	Freight
1925	$244,605.97	$459,995.64
1926	211,763.20	428,314.70
1927	178,175.39	493,562.82
1928	161,688.76	526,516.72
1929	146,554.60	490,455.81
1930	115,545.03	465,421.41
1931	89,632.57	396,357.89
1932	67,410.45	372,474.35
1933	61,429.99	391,718.19
1934	61,346.25	378,934.25

The above figures exclude baggage revenues, mail revenues, express revenues, milk revenues, freight-switching revenue, and miscellaneous transportation revenues, none of which were substantial.

16.2% of freight revenues, and only 13.7% of total transportation revenues.[3]

In 1934 the respondent operated an average of 12.7 passenger cars per day as compared to 47.7 freight cars.[4] The average number of cars per freight train in 1934 was 6.2 (R. 221). The freight carried consisted in the main of beets, sugar, potatoes, sand and gravel, milk, canned goods, tomatoes, cattle, coal, gasoline, and lumber (R. 233-234)—commodities which obviously are not ordinarily carried by interurban railways. Approximately 64% of the freight handled was interchanged with other carriers (computed from Plaintiff's Exhibit 28, R. 233-234; cf. R. 319); approximately one-half of the freight so interchanged moved to or from points in other states (R. 233, 234, 320).[5]

This traffic moved almost entirely in standard freight equipment furnished by connecting railroads (R. 283, 320). Interchange connections were maintained with the Oregon Short Line, the Union Pacific, the Southern Pacific, and the Denver and Rio Grande (R. 313, 320). Respondent is a party

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[3] Computed from Exhibit 26 introduced before the Commission (R. 229).

[4] These figures are computed by multiplying the average number of cars per train (R. 221) by the average number of trains per day (R. 210). Cf. R. 319.

[5] Respondent does not deny that it is engaged in interstate commerce. Its line connects points in Utah and Idaho, and a substantial portion of its freight traffic is interstate.

to practically all of the tariffs publishing through freight rates to or from its territory, and its interchange traffic generally moves on joint rates (R. 312, 320).

Respondent owns seven electric locomotives, which are used to haul its freight traffic; 173 freight cars, 99 of which are interchangeable with steam railroads; and only 22 passenger cars, including passenger motor cars (R. 165, 283, 320).

On the basis of this evidence the Commission found that respondent was not an interurban railroad.

After the decision by the Interstate Commerce Commission, the National Mediation Board ordered the respondent to post the formal notice prescribed by Section 2, Eighth, of the Act (R. 138). The carrier refused to post the notice (R. 138). Instead, on June 24, 1936, it brought this suit against the United States Attorney, praying for a declaratory judgment and an injunction against enforcement of the Railway Labor Act (R. 17–32). In addition to claiming that it was an interurban electric railway, and accordingly not subject to the Act, the carrier alleged that the Act was in many respects unconstitutional (R. 23–26, 29–32). The United States Attorney, in his answer, denied the charges of unconstitutionality and alleged that the determination of the Interstate Commerce Commission, already referred to, was conclusive, since it was not arbitrary or capricious and since it was

based upon substantial evidence (R. 32–36). The Interstate Commerce Commission, by leave of court, intervened as party defendant, and filed a similar answer (R. 39–41).

The District Court, overruling objections by petitioners, permitted respondent to try *de novo* the question already determined by the Commission (R. 83, 111), and respondent then introduced, as original evidence, testimony most of which was along substantially the same lines as the evidence before the Commission (R. 77–141).* The petitioners then introduced the report of the Commission (R. 314–325), and respondent introduced the record made before the Commission (R. 266–313).

The court found, on the basis of the evidence introduced before it and of the evidence before the Commission, that respondent was an interurban electric railway (R. 67, 147). The court did not find that the conclusion reached by the Commission was arbitrary, capricious, or not based upon sub-

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*The exhibits introduced in the court below which were not in evidence before the Interstate Commerce Commission are Exhibits 8, 27–1, 27–2, 27–3, 28, and 29–48, R. 166, 231, 232, 235–266. The court below took judicial notice of Exhibits 29, 30, and 31, which are publications of the Interstate Commerce Commission; they are not printed in the record. Exhibits introduced before the Commission which were not in evidence before the district court, except as a part of the record made before the Commission, are found at R. 229, 233, 234, and are numbered Exhibits 26 and 28 (their numbers before the Commission). There are thus two different sets of exhibits numbered 26 and 28.

stantial evidence, but only that it was "contrary to law." *Cf.* R. 67 and R. 149–150. The court thereupon granted an injunction against enforcement of the Act against respondent by the United States Attorney (R. 68–69). In view of its decision that the Act did not apply to respondent, the court did not pass upon any of the constitutional questions raised.

The decision of the District Court was affirmed by the Circuit Court of Appeals, Judge Bratton dissenting (R. 327–342).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts.

2. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts unless arbitrary, capricious, or not supported by substantial evidence.

3. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was not arbitrary, capricious, or unsupported by substantial evidence.

4. In failing to hold that the District Court erroneously admitted into evidence and relied upon

testimony as to respondent's status which was not included in the record before the Interstate Commerce Commission.

5. In holding that respondent was an interurban electric railway.

6. In holding that respondent was exempt from the Railway Labor Act.

REASONS FOR GRANTING THE WRIT

I

THE QUESTION INVOLVED IS ONE OF PUBLIC IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT

The Railway Labor Act exempts from its operations

> any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

Various sections of the Interstate Commerce Act and related acts contain similar exemptions. See *United States* v. *Village of Hubbard*, 266 U. S. 474, 480. But the Railway Labor Act provides, in addition, that upon request of the National Mediation Board or upon complaint of any interested party the Interstate Commerce Commission is to determine after hearing whether any line operated by electric power falls within the terms of the exempting proviso. This provision enables both the elec-

tric railways and the administrative bodies charged with the administration of the statute speedily and definitely to ascertain whether or not a particular line is subject to the Act.[1]

The National Mediation Board has requested the Interstate Commerce Commission to determine whether certain electric lines, which in some respects resemble the trunk-line railroads and in other respects interurban railways, come within the proviso. The Interstate Commerce Commission, after full hearings, has made its determinations. Respondent and other carriers, which had been held by the Commission not to be interurban railways, have brought suit in the district courts to enjoin the United States Attorneys from enforcing the Railway Labor Act against them and for declaratory judgments, claiming that they were interurban railways exempt from the statute.[2] Up

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[1] The need for such an administrative determination is illustrated by the facts in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1. In the former the carrier was required to begin construction of a new line of road before it could obtain a judicial determination that it did not come within the exemption and that the construction was illegal; in the latter, a decision that the carrier was subject to the Act might have invalidated millions of dollars of securities previously issued.

[2] The cases in the district courts have been cited by this Court in its opinion in *Shannahan* v. *United States*, decided April 4, 1938, Footnote 5. In addition to the decisions of the District Court and the Circuit Court of Appeals in the present case, the question has been decided in *Hudson &*

to this time, each of the lower courts passing upon the question has completely ignored the determination by the Interstate Commerce Commission, has decided the question for itself, and has held, contrary to the determination of the Commission, that the electric railway involved was an interurban and accordingly not subject to the Railway Labor Act. In the instant case the District Court permitted the question of whether or not respondent was an interurban railway to be tried entirely *de novo* before it, and on the basis of the evidence introduced before it (as well as the evidence before the Commission), held that the respondent was an interurban. The Circuit Court of Appeals, in affirming the decision below and relying on the evidence newly adduced, has approved this procedure.

The decisions of the lower courts, of which that in the instant case is the most extreme, have resulted in paralysis of the plan established by Congress for the determination of which electric railways are subject to the Railway Labor Act. It is important that the bodies charged with the administration of that statute—the National Mediation Board and the National Railroad Adjustment Board—know what carriers are subject to their jurisdiction. They cannot await judicial determination of the question, which is dependent upon violation of the Act by the carrier, inasmuch as

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Manhattan Ry. v. *Hardy*, 22 F. Supp. 105 (S. D. N. Y.), and *Texas Electric Ry.* v. *Eastus* (N. D. Tex., decided June 4, 1936).

their function is to settle labor disputes involving carriers who may never violate the Act. Congress assumed that it had solved this problem by the authorization to the Interstate Commerce Commission.

The question here presented has importance in the administration of other statutes than the Railway Labor Act. If an electric railway engaged in interstate commerce is an interurban not subject to the Railway Labor Act, it is subject to the National Labor Relations Act.[9] Neither the agencies established under the Railway Labor Act nor the National Labor Relations Board can effectively assume jurisdiction until the carrier's status is ascertained. The same is true as to the Railroad Retirement Board and the Social Security Board, and as to the Collector of Internal Revenue in collecting the taxes imposed by the Carriers' Taxing Act and the lower taxes imposed by the Social Security Act.[10] The Railroad Retirement Act of 1937 and the Carriers' Taxing Act contain exemption provisos sub-

[9] In Section 2 (2) of the National Labor Relations Act, the term "employer" is defined so as to except "any person subject to the Railway Labor Act."

[10] The Railroad Retirement Act and the Carriers' Taxing Act amend the definition of "employment" in Titles 4 and 10 of the Social Security Act so as to exclude services performed by employees subject to the Railroad Retirement Act and Carriers' Taxing Act, respectively. 50 Stat. 317, U. S. C., Title 45, Sec. 228q; 50 Stat. 439, U. S. C., Title 45, Sec. 269.

stantially identical with that in the Railway Labor Act, each authorizing the Interstate Commerce Commission to determine which electric railways come within the exempting clause. 50 Stat. 307, U. S. C., Title 45, Sec. 228a (a); 50 Stat. 435, U. S. C., Title 45, Sec. 261 (a). It is of course important that both the electric railways and their employees be able to discover through the expeditious and simple means prescribed by Congress, and without the necessity of first violating the law, whether they are governed by the Railway Labor Act, Railroad Retirement Act, and Carriers' Taxing Act, on the one hand, or the National Labor Relations Act and the Social Security Act, on the other. It is important for the Interstate Commerce Commission to know whether its determinations as to the status of electric railways under the Railway Labor Act, and also under the Railroad Retirement Act and Carriers' Taxing Act, may be ignored by the courts.

The decisions of the lower courts and, particularly, of the Circuit Court of Appeals in this case effectively nullify the carefully designed statutory solution for these problems. It is therefore important that this Court decide whether or not, and to what extent, the determinations made by the Interstate Commerce Commission are to be controlling.

II

THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF THIS COURT

A. THE SCOPE OF JUDICIAL REVIEW

In Section 1 of the Railway Labor Act, Congress specifically authorized the Interstate Commerce Commission to determine which lines operated by electric power fell within the exemption proviso for interurban electric railways. This Court has decided in cases too numerous to cite that under such circumstances [11] the decisions of the Interstate Commerce Commission may not be ignored by the courts—that they are binding, at least if supported by substantial evidence, and neither arbitrary nor capricious.[12] *E. g., Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. The decision below conflicts with this established line of authorities. As Judge Bratton pointed out in his dissenting opinion (R. 336), the District Court did not find that the Commission

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[11] The question to be determined is not of the kind held independently reviewable by the courts in *Crowell* v. *Benson*, 285 U. S. 22, and *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38.

[12] Whether under this statute the Commission's determination is controlling even apart from this limitation need not be considered in this petition. Cf. *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172; *Buttfield* v. *Stranahan*, 192 U. S. 470.

had acted arbitrarily, capriciously, or without substantial evidence; nor did the court below make such a finding. That they did not regard themselves as subject to the ordinary limitations upon the scope of judicial review is shown by the fact that they permitted respondent to try the case *de novo*, on a new record, in the District Court."

B. THE MEANING OF "INTERURBAN ELECTRIC RAILWAY"

As is shown in the Statement, more than 80 percent of respondent's revenues are derived from the transportation of freight; indeed in 1934, the last year as to which evidence was taken, only 13.7% of its revenue was derived from passenger traffic. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, this Court recognized that interurban railways were lines primarily engaged in the carriage of passengers. In the *Piedmont* case, this Court pointed out that (286 U. S. at 307):

> the characteristics of street or suburban railways persisted in these interurban lines. *They also were chiefly devoted to passenger traffic* and operated single or series self-propelled cars. Many of them carried pack-

[12] The lower courts in this case seemed to treat the question of whether respondent was of was not an interurban electric railway as exclusively a question of law. In *Shaughnahan* v. *United States*, decided April 4, 1938, this Court declared that "the function of the Commission is limited to the determination of a fact."

> age freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads. It is clear that the phrase "interurban electric railway" *was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars.* [Italics supplied.]

In holding the Chicago North Shore to be an interurban railway, this Court noted that (288 U. S. at p. 10):

> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. *The freight business is subsidiary to this primary function,* and is not fairly comparable to that ordinarily transacted by a standard steam railroad. *Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business.* The main terminals serve only the passenger and merchandise freight traffic.
>
> We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. [Italics supplied.]

In the instant case the Interstate Commerce Commission held that a carrier whose major activity was the transportation of freight in stand-

and freight cars, almost two-thirds of which were interchanged with steam-railroads, was not an interurban electric railway. The District Court and the Circuit Court of Appeals have ruled to the contrary. The determination of the Interstate Commerce Commission would seem to be in accord with the prior decisions of this Court. The holdings of the lower courts are in conflict with those decisions. In any event, the Commission's determination obviously cannot be deemed arbitrary, unreasonable, or not supported by substantial evidence.

It is difficult to understand the reasoning of the majority opinions of the court below. Only with hesitation do we venture to interpret those opinions. They apparently assume that the Interstate Commerce Commission had no power to determine that respondent was not an interurban, but only to decide whether it was "part of a general steam-railroad system of transportation." This construction of the statute is plainly untenable;[14] the Commission is authorized to decide what lines operated by electric power come within the exempting proviso, and the proviso exempts from the Act "interurban" railways. Thus, the Commission necessarily possesses the power to determine whether or not a line is interurban.

The majority of the court below apparently was of opinion that there had been a course of adminis-

[14] The construction adopted by the majority of the Circuit Court of Appeals has never been suggested by counsel for respondent.

trative interpretation of similar exemption provisos showing that the Commission regarded respondent as an interurban railway. This was not the case. In the only prior case in which respondent's status was determined in a formal proceeding, respondent was held not to be an interurban railway. *Rules for Testing Other Than Steam Power Locomotives*, 122 I. C. C. 414." It is true, as the lower court pointed out, that the Commission had failed to take steps which would have brought respondent within Section 20a of the Interstate Commerce Act, even though it had knowledge

"It should be noted that Congress delegated to the Commission the authority to determine which electric railways were interurban after the Commission had for a number of years consistently held that only roads dependent upon passenger traffic for the bulk of their revenues were interurban railways. *In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad*, 71 I. C. C. 653; *Proposed Control of Sacramento Northern by Western Pacific Railroad*, 79 I. C. C. 782; *Application of Section 15A of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751; *In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other than Steam Power*, 122 I. C. C. 414; *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363; *Railway Mail Pay: In the Matter of Application of the Illinois Terminal Company*, 174 I. C. C. 796.

The choice of the Commission as the body to determine the question manifests an intention on the part of Congress that the principles established by the Commission in deciding similar cases in the past should be applicable under the Railway Labor Act.

which might have warranted the taking of such a
tion; but this inactivity is not entitled to
as an administrative precedent. The most th
can be said by respondent is that the administra
tive precedents are conflicting. With respect
this precise issue, this Court said in the *Pied*
case (286 U. S. at 312):

> Only a word need be said with respect
> the contention that governmental agenc
> have heretofore classified the railway as
> interurban electric line. It is true that
> connection with quite diverse administrativ
> functions the United States Labor Boa
> the Postmaster General, and the Interst
> Commerce Commission have classified pe
> tioner's railway as an interurban electri
> line in distinction to steam railroa
> Neither the administrative nor the statutor
> classification has, however, been uniform
> and in any event is not controlling in th
> litigation.

CONCLUSION

Wherefore, it is respectfully submitted that th
petition for a writ of certiorari to review the ju
ment of the Circuit Court of Appeals for the Te
Circuit should be granted.

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Interstate Commerce Commission.

APRIL 1938.

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INDEX

	Page
...s below	1
...tion	1
...ions presented	2
...te involved	2
...ment	5
...ation of errors to be urged	14
...ary of argument	15
...ent:	
I. The Scope of Judicial Review	18
A. The determination by the Interstate Commerce Commission that plaintiff does not come within the exemption proviso is binding upon the courts unless arbitrary, capricious, or not based upon substantial evidence	18
B. The determination of the Interstate Commerce Commission should be final if made after a hearing	37
II. The Determination by the Interstate Commerce Commission that respondent was not an interurban electric railway is supported by substantial evidence and is neither arbitrary nor capricious	39
III. The Constitutionality of the Railway Labor Act	66
...sion	66

CITATIONS

Asher v. *United States*, 298 U. S. 426	19
Application of Section 15A of the Interstate Commerce Act to Electric Railways, 86 I. C. C. 751	49
Application of Section 15 (a) to Interstate Public Service Co., 117 I. C. C. 228	54, 56
Bates & Guild Co. v. *Payne*, 194 U. S. 106	19, 30
Brotherhood of Railroad Shop Crafts v. *Lowden*, 86 F. (2d) 459, cert. den., 300 U. S. 659	36
Brotherhood of Railroad Trainmen v. *National Mediation Board*, 88 F. (2d) 757	36
Butte, Anaconda & Pac. Ry. Co. v. *United States*, 290 U. S. 127	35, 38
Chicago, Ottawa and Peoria Railway Company v. *Chicago and Northwestern Ry. Co. et al.*, 33 I. C. C. 573	54
Chicago South Shore & South Bend R. R., 214 I. C. C. 167	57

84239—38——1

Cases—Continued.

Cincinnati & Columbus Traction Company v. *Baltimore & Ohio Southwestern Railroad Company et al.*, 20 I. C. C. 486
Commissioner of Patents v. *Whitely*, 4 Wall. 522
Crowell v. *Benson*, 285 U. S. 22
Decatur v. *Paulding*, 14 Pet. 497
Electric Railway Mail Pay Cases, 58 I. C. C. 455 (1920), 98 I. C. C. 737 (1925)
Florida v. *United States*, 292 U. S. 1
Fort Dodge, Des Moines & Southern Ry. Co., 211 I. C. C. 9
Gaines v. *Thompson*, 7 Wall. 347
Georgia Public Service Commission v. *United States*, 283 U. S. 765
Great Northern Ry. Co. v. *United States*, 277 U. S. 172
Houston v. *St. Louis Independent Packing Company*, 249 U. S. 479
Hudson & Manhattan R. Co. v. *Hardy*, 22 F. Supp. 105
Illinois Central R. Co. v. *Interstate Commerce Commission*, 206 U. S. 441
Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541
In the Matter of the Application of the Western Pacific Railroad Company for authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad, 71 I. C. C. 658
In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other Than Steam Power, 122 I. C. C. 414
Kendall v. *United States*, 12 Pet. 524
Lewis v. *Frick*, 233 U. S. 291
Locomotive Inspection Act Cases, 122 I. C. C. 414 49, 52, 59, 61,
Louisville Board of Trade et al. v. *Indianapolis, Columbus and Southern Traction Company et al.*, 27 I. C. C. 499
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457
Marques v. *Frisbie*, 101 U. S. 473
Michigan R. Co. v. *Pere Marquette R. Co.*, 74 I. C. C. 496
Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282
Moore v. *Robbins*, 96 U. S. 530
Morgan v. *United States*, 298 U. S. 468, 304 U. S. 1 19,
National Labor Relations Board v. *Fruehauf Trailer Co.*, 301 U. S. 49
National Labor Relations Board v. *Mackay Radio & Tel. Co.*, 304 U. S. 333
New York v. *United States*, 257 U. S. 591
Oklahoma Ry. Co., 218 I. C. C. 123

Cases—Continued. Page

Pacific Electric Ry. Co., 245 I. C. C. 514 57
Panama Refining Co. v. Ryan, 293 U. S. 388 33
Pennsylvania Company v. United States, 236 U. S. 351 19
Piedmont & Northern Ry. Co. v. Interstate Commerce Commission, 286 U. S. 299 ..... 17, 18, 22, 24, 26, 27, 40, 43, 44, 45, 46, 63
Piedmont & Northern Ry. Co., 211 I. C. C. 4 57
Piedmont & Northern Ry. Co. v. United States, 280 U. S. 469 25
Proposed Construction of Lines by Piedmont & Northern Ry. Co., 138 I. C. C. 363 51
Proposed Control of Sacramento Northern by Western Pacific Railroad, 79 I. C. C. 782 48
Railway Mail Pay: In the Matter of the Application of Illinois Terminal Company, 174 I. C. C. 795 ..... 51, 52
Riverside Oil Co. v. Hitchcock, 190 U. S. 316 19
St. Joseph Stockyards Co. v. United States, 298 U. S. 38 ..... 19, 33, 34
Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57 19
Shannahan v. United States, 303 U. S. 596 ..... 15, 28, 36
Standard Oil Co. v. United States, 283 U. S. 235 19
Stewart v. McHarry, 159 U. S. 643 35
St. Louis, Springfield and Peoria Railroad et al. v. Peoria and Pekin Union Railway Company, 26 I. C. C. 226 53
Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297 ..... 19, 20, 34
Tagg Bros. & Moorhead v. United States, 280 U. S. 420 61
Tang Tun v. Edsell, 223 U. S. 673 ..... 19, 35
Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548 36
Texas and Pacific Ry. Co. v. Gulf, Colorado and S. F. Ry. Co., 270 U. S. 266 25
United States Railway Labor Board Decisions, Vol. I, p. 53, Dec. No. 33 47
United States v. Brooklyn Terminal Company, 249 U. S. 296 65
United States v. California, 297 U. S. 175 65
United States v. Chicago North Shore & Milwaukee R. Co., 288 U. S. 1 ..... 17, 24, 26, 27, 40, 43, 44, 45, 46, 55, 63
United States v. Great Northern Ry. Co., 287 U. S. 144 35
United States v. Grimaud, 220 U. S. 506 37
United States v. Idaho, 298 U. S. 105 ..... 24, 25, 26
United States v. Louisville & Nashville R. R. Co., 235 U. S. 314 ..... 19, 23, 28
Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 ..... 36, 66
Virginian Ry. Co. v. United States, 272 U. S. 658 ..... 19, 28
Washington, Virginia, and Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142 34

Statutes:
Bankruptcy Act of 1933, c. 204, 47 Stat. 1467, 1482 (U. S. C., Title 11, Sec. 205 (m))
Interstate Commerce Act, c. 91, 24 Stat. 484, 476 (U. S. C., Title 49, Secs. 1 (22), 16 (12), 26a (2))
Locomotive Inspection Act, c. 265, 45 Stat. 659 (U. S. C., Title 45, Sec. 22)
Railway Labor Act of 1926, c. 347, 44 Stat. 577
Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185 (U. S. C., Title 45, Secs. 151–163):
Sec. 1, First
Sec. 2, Eighth
Sec. 2, Tenth
Transportation Act of 1920, c. 91, Sec. 300, 41 Stat. 460, 469, 480 (U. S. C., Title 49, Secs. 73, 77, 15a (1))
Urgent Deficiencies Act (Act of October 22, 1913, c. 32, 38 Stat. 208, 219)
U. S. Code, Title 8, Sec. 23
Miscellaneous:
Annual Reports of the Interstate Commerce Commission, 1921 through 1935 (excerpts quoted R. 240–260)
Hearings before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, pp. 22, 84, 107–110
Hearings before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 1986, pp. 22, 25, 97–103, 158, 162

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court wrote no opinion. The opinions of the Circuit Court of Appeals (R. 327-342) are reported in 95 F. (2d) 911. The opinion of the Interstate Commerce Commission (R. 314-325) is reported in 214 I. C. C. 707.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1938 (R. 327). The jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether and to what extent a determination by the Interstate Commerce Commission that a carrier is not an interurban electric railway within the meaning of the exemption proviso in Section 1, First, of the Railway Labor Act, as amended June 21, 1934, is binding upon the courts, and whether the courts may determine the question *de novo* without giving any weight to the decision of the Commission.

2. Whether the determination by the Interstate Commerce Commission, that the Utah-Idaho Central Railroad Company is not an interurban electric railway is arbitrary, capricious, or without substantial evidence to support it.

STATUTE INVOLVED

The section of the Railway Labor Act (c. 691, 48 Stat. 1185, U. S. C., Title 45, Sections 151–163) primarily involved is the proviso in Section 1 exempting certain interurban electric railways from the definition of "carrier". Section 1, in so far as material to this proceeding, reads as follows:

> Section 1. When used in this Act and for the purposes of this Act—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate

Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or surburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Section 2, Eighth, which is the only provision of the Act which the record shows respondent to be violating, reads as follows:

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be

specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Section 2, Tenth, which prescribes criminal penalties for the violation of Section 2, Eighth, *supra*, reads in part as follows:

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute

in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *.

STATEMENT

On October 1, 1934, the National Mediation Board requested the Interstate Commerce Commission to determine whether the Utah Idaho Central Railroad Company came within the terms of the proviso exempting certain electric railways from the operation of the Railway Labor Act (R. 40, 54, 266, 314). The Commission designated an Examiner to hold a hearing and take testimony, and a hearing was held in Ogden, Utah, at which testimony was introduced by the railroad company (Plaintiff's Ex. 49, R. 266–313). The proposed report of the Examiner was submitted to the carrier, exceptions were filed with the Commission, and oral argument held before Division Three of the Interstate Commerce Commission (R. 314–315). On March 18, 1936, the Commission handed down its opinion (214 I. C. C. 707; R. 314–325), in which it found that the respondent was not an interurban electric railroad within the meaning of the exempting proviso.[1]

[1] The Commission found that none of the stocks or bonds of respondent was owned by any steam railroad, and that "The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso"

The report of the Commission contains a careful and concise analysis of all the evidence that was produced, including the evidence upon which respondent relies. We respectfully refer the Court to pages 709–713 of that report (R. 316–322), both for a detailed summary of the evidence and so that the Court may see for itself the impartial manner in which the Commission approached the problem and the reasonableness of its decision. Only the more important facts will be set forth in this brief.

The report of the Commission and the evidence adduced before it showed that the Utah Idaho Central Railroad was an electric railway connecting points in Utah and Idaho. The main line is 94 miles long, and there are two branch lines, seven and 14 miles long, respectively. The principal cities served are Ogden, Brigham, and Logan, Utah, and Preston, Idaho (R. 316–317). The road carries freight, passengers, mail and express (R. 319).

Respondent has many of the physical characteristics of an interurban railroad. Its tracks on the whole are of lighter weight (R. 284–285), its grades slightly steeper (R. 285), its curves sharper (R. 285), its stations and side-tracks more frequent (R. 285–286, 295–296), its motive power of less capacity (R. 281–282), its side-tracks shorter than is customary on trunk line railroads (R. 285–286,

(214 I. C. C. at 708, R. 315). This case does not raise, therefore, any question as to the relationship of respondent to "a" or "the" steam railroad system of transportation.

215). Approximately one-fifth of its mileage is located in public streets or highways in cities, towns, and villages; the remainder on private right-of-way (R. 286–287). The passenger business of respondent is operated in the same manner as that of any interurban electric railway (R. 319).

But the respondent is predominantly a carrier of freight. Even when the road was first completed in 1916, freight revenues were substantial (I. C. C. Ex. 26, R. 229), and since 1918 freight revenues have exceeded passenger revenues (*ibid.*). During the five years from 1930 to 1934, inclusive (the last years for which figures were introduced in evidence before the Interstate Commerce Commission), the total freight revenues constituted over 80% of the total revenues of the carrier (*ibid.*).[2]

[2] Exhibit 26, introduced before the Interstate Commerce Commission (but not before the court below except as a part of the record before the Commission, Plaintiff's Ex. 49), shows that passenger and freight revenues from 1925–1934 were as follows (R. 229):

	Passenger	Freight
1925	$344,605.97	$459,996.64
1926	211,763.20	428,314.70
1927	178,175.39	493,562.82
1928	161,668.76	526,516.72
1929	146,554.60	490,455.81
1930	115,545.03	465,421.41
1931	89,632.57	396,387.89
1932	67,410.45	372,474.35
1933	61,429.99	391,718.19
1934	61,346.25	378,934.25

The above figures exclude baggage revenues, mail revenues, milk revenues, freight-switching revenues, and miscellaneous transportation revenues, none of which were substantial.

In 1934 passenger revenues were only 16.2% of freight revenues, and only 13.6% of total transportation revenues.[1]

In 1934 the respondent operated an average of 11.5 passenger trains per day, such trains averaging 1.1 cars per train, and an average of 7.7 freight trains per day, the average length of such trains being 6.2 cars (R. 319, 210, 221, 295, 298–299). Thus respondent operated an average of 12.7 passenger cars per day as compared to 47.7 freight cars. The freight carried consisted in the main of beets, sugar, potatoes, sand and gravel, milk, canned goods, tomatoes, cattle, coal, gasoline, and lumber (I. C. C. Ex. 28, R. 233–234)—commodities which obviously are not ordinarily carried by interurban railways. During the last half of 1934 respondent carried 6354 carloads of freight, 2226 being handled entirely upon respondent's lines and 4128, or approximately 64%, being interchanged with other carriers. (*Ibid.*, cf. R. 319–320.) Of the freight traffic interchanged with other lines, 2075 cars moved to or from points in Utah and 2053, or approximately one-half, moved to or from points in other states. Thus, almost one-third of the freight traffic carried moved in interstate commerce. A large proportion of the freight traffic consisted of agricultural products being transported in raw form to processing plants and in processed form to connecting railroads en route to market (R. 319). For

[1] Computed from I. C. C. Exhibit 26 (R. 229).

special products such as milk, peas, and tomatoes, respondent provided short special service trains to the processing plants (R. 319, 277).

This traffic moved almost entirely in standard freight equipment furnished by connecting railroads (R. 283, 320). Interchange connections were maintained with four railroads: the Oregon Short Line, the Union Pacific, the Southern Pacific, and the Denver and Rio Grande (R. 313, 320). Respondent is a party to practically all of the tariffs publishing through freight rates to or from its territory, and its interchange traffic generally moves on joint rates (R. 312, 320).

Respondent owns seven electric locomotives, which are used to haul its freight traffic, 178 freight cars, 99 of which are interchangeable with steam railroads; and only 22 passenger cars, including passenger motor cars (R. 283, 320).

The number of cars per freight train in 1934 was necessarily much smaller than that on the trunk lines, inasmuch as the physical equipment and power of respondent prevents it from running long trains. Because of the smaller number of cars per train, the cost per car-mile per trainman was considerably greater than that on a trunk line (R. 216-221, 303).

On the basis of this evidence the Commission found that respondent was not an interurban railroad.

After the decision by the Interstate Commerce Commission, the National Mediation Board or-

dered the respondent to post the formal notice prescribed by Section 2, Eighth, of the Act (R. 138). The carrier refused to post the notice (R. 138). Instead, on June 24, 1936, it brought this suit against the United States Attorney, praying for a declaratory judgment and an injunction. In addition to claiming that it was an interurban electric railway, and accordingly not subject to the Act, the carrier alleged that the Act was in many respects unconstitutional (R. 22–26, 29–32). The United States Attorney, in his answer, denied the charges of unconstitutionality and alleged that the determination of the Interstate Commerce Commission, already referred to, was conclusive, since it was not arbitrary or capricious and since it was based upon substantial evidence (R. 32–36). The Interstate Commerce Commission, by leave of court, intervened as party-defendant, and filed a similar answer (R. 39–41). In reply to these answers, respondent contended that the decision of the Interstate Commerce Commission was arbitrary and unreasonable and without an evidentiary foundation (R. 53–55).

In the District Court respondent attempted to retry the question already determined by the Commission. The defendants objected to the introduction of new evidence bearing on the question of whether respondent was or was not an interurban, and insisted that only the record before the Inter-

state Commerce Commission could be introduced (R. 78, 83, 111). The defendants maintained that inasmuch as Congress had expressly directed the Commission to determine that question, the only issue before the court was whether the Commission had acted arbitrarily, capriciously, or without substantial evidence, and that the record before the Commission was the only evidence admissible on that question. The court overruled the objection, and permitted respondent to try the question *de novo* (R. 83, 111). Over objection respondent introduced, as original evidence, substantially the same evidence[4] (see pp. 6–9, *supra*) as that before the Commission (R. 77–141). Since that evidence has already been analyzed, it will not be summarized here. It is sufficient to point out that the figures for 1935, introduced into evidence by respondent, show that respondent carried even a larger proportion of freight and ran less passenger

[4] The exhibits introduced in the court below which were not in evidence before the Interstate Commerce Commission are Exhibits 8, 27–1, 27–2, 27–3, 28, and 29–48, R. 166, 231, 232, 235–266. The court below took judicial notice of Exhibits 29, 30, and 31, which are publications of the Interstate Commerce Commission; they are not printed in the record. Exhibits introduced before the Commission which were not in evidence before the district court, except as a part of the record made before the Commission, are found at R. 229, 233, 234, and are numbered Exhibits 26 and 28 (their numbers before the Commission). There are thus two different sets of exhibits numbered 26 and 28.

trains in 1935 than in 1934.* The defendants then introduced the report of the Commission (R. 314–325), and respondent introduced the record made before the Commission (R. 266–313).

In addition to the evidence relating to whether the Utah Idaho Central was an interurban, respondent also introduced testimony showing that its employees had formerly been represented by the Amalgamated Association of Street and Electric Railway Employees, that the Brotherhood of Railway Trainmen, one of the four railroad brotherhoods, claimed a right under the Railway Labor Act to represent its train and yard service employees, that the Brotherhood demanded that respondent accept a contract for such employees with similar terms as to rates of pay and conditions of employment to those in effect on steam railroads, and that such a contract was not suited to its method of operation and would entail prohibitive expense (R. 120–138). This evidence is not relevant or material to any of the issues of this case; the Railway Labor Act does not require respondent either to deal exclusively with the so-called railroad brotherhoods or to accept demands made by them but unsatisfactory to it.

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*Passenger revenues in 1935 were only $64,400 out of $514,000 total revenues, or 12.6% (R. 198). The average number of passenger trains operated daily decreased from 11.5 in 1934 to 9.6 in 1935, while the average number of freight trains increased from 7.7 to 7.8 (R. 210).

The District Court found, on the basis of the evidence introduced before it and of the evidence before the Commission, that respondent was an interurban electric railway (R. 67, 147). The court did not state that the conclusion reached by the Commission was arbitrary, capricious, or not based upon substantial evidence, but only that it was "contrary to law". Cf. R. 67 and R. 149–150. The court thereupon granted an injunction against enforcement of the Act against respondent by the United States Attorney (R. 68–69). In view of its decision that the Act did not apply to respondent, the court did not pass upon any of the constitutional questions raised.

The decision of the District Court was affirmed by the Circuit Court of Appeals, Judge Bratton dissenting (R. 327–342). The majority of the Circuit Court of Appeals appears to hold that the Interstate Commerce Commission had no power to determine whether or not respondent was an interurban railway, but only to decide whether it was "part of a general steam railroad system of transportation." The court accordingly found that the District Court had not erred in trying the former issue *de novo*, and it accepted the findings of the District Court that respondent was an interurban railway (R. 332–334). Judge Bratton was of the opinion that the finding of the Interstate Commerce Commission was binding upon the court if "supported by substantial evidence, unless the

action transcends the authority of the Commission or presents some other fatal irregularity." (R. 337). After examining the evidence carefully, he concluded that the Commission's determination was not arbitrary, or capricious, or made without substantial evidence to support it, and that it was, therefore, controlling upon the Court (R. 338–342).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts.

2. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts unless arbitrary, capricious, or not supported by substantial evidence.

3. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was not arbitrary, capricious, or unsupported by substantial evidence.

4. In failing to hold that the District Court erroneously admitted into evidence and relied upon testimony as to respondent's status which was not included in the record before the Interstate Commerce Commission.

5. In holding that respondent was an interurban electric railway.

6. In holding that respondent was exempt from the Railway Labor Act.

SUMMARY OF ARGUMENT

I, A. In the Railway Labor Act, Congress authorized the Interstate Commerce Commission to determine which lines operated by electric power fall within the exemption proviso for interurban electric railways, and the determination of the Commission is binding upon the courts unless arbitary, capricious, or unsupported by evidence. This is established by a long line of authorities. The lower courts in the instant case gave no weight to the Commission's decision and decided the question independently, thus completely disregarding these principles. The holding of the majority of the Circuit Court of Appeals that the Commission was not authorized by the statute to determine whether particular electric lines were interurban, but only whether they were parts of a general steam-railroad system of transportation, is contrary to the plain meaning of the Act.

There is no merit in respondent's arguments that the Commission's decision should not be accepted by the courts. The Commission's determination is one of fact. *Shannahan* v. *United States*, 303 U. S. 596. It is as binding upon the courts when attacked collaterally, as here, as if directly assailed. The courts are bound by the determination under the Railway Labor Act, although they were not bound by decisions of the Commission interpreting

earlier exemption provisos for interurban electric railways; for the Railway Labor Act differs from the prior exemptions in that it authorizes the Commission to determine which lines are exempted. Under the decisions of this Court, the Commission's determination is binding upon the courts even though Congress has nowhere expressly limited the scope of judicial review. The attack upon the constitutionality of the Railway Labor Act in this case does not have the effect of rendering all questions of fact in the case "constitutional facts" to be independently determined by the courts. Respondent's argument to the contrary entirely misconceives the meaning of this Court's decisions, indicating that certain questions of constitutional fact may be tried *de novo*.

B. Inasmuch as the Commission's determination under Section 1 of the Railway Labor Act is neither a regulation nor an order but merely a finding of fact, it should be accepted as conclusive provided the requisites of a fair hearing have been complied with.

II. The opinion rendered by the Interstate Commerce Commission is neither arbitrary, capricious, nor unreasonable, and is based upon substantial evidence. When a carrier earns only 13.7% of its total transportation revenue from passenger traffic, a decision that it is not an interurban railway is supported not only by substantial evidence but by the weight of the evidence as well. The fact that the physical characteristics of respondent's line are

those of interurban railways is not controlling, in view of the proportion and kind of freight traffic transported. The freight carried is not "peculiarly local"; almost two-thirds of it is interchanged with the steam-railroads and constitutes the same kind of traffic as is carried by such roads. In holding that such a road was not an interurban railway, the Commission properly applied the principles laid down by this Court. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1.

In a number of cases during the 12 years preceding the 1934 amendments to the Railway Labor Act, the Interstate Commerce Commission had been called upon to decide what carriers were interurban electric railways within the meaning of various exemption provisos in the Interstate Commerce and related Acts. In these cases the Commission had consistently interpreted the phrase "interurban electric railway" as not including electric lines engaged to a large extent in the transportation of freight in the same equipment as the steam roads and interchanging such freight with the steam roads. Congress was aware of these decisions when it amended the Railway Labor Act in 1934. When Congress chose the Commission to make the determination under the Railway Labor Act, the inescapable inference is that it approved the principles which the Commission had previously followed in deciding such cases.

The majority of the court below apparently was of the opinion that there had been a course of administrative interpretation of similar exemption provisos showing that the Commission regarded respondent as an interurban railway. An examination of these so-called administrative precedents will demonstrate that they do not support the conclusion drawn from them. They are based upon the failure of the Commission on certain occasions to treat respondent as if it were NOT an interurban railway, not upon any affirmative decision of the Commission holding respondent to be an interurban. On the contrary the Commission in formal proceedings has twice held that respondent was not an interurban. The most that can be said for respondent is that the administrative precedents are conflicting. Accordingly they cannot be regarded as controlling here. *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 312.

ARGUMENT

I

The Scope of Judicial Review

A. THE DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION THAT PLAINTIFF DOES NOT COME WITHIN THE EXEMPTION PROVISO IS BINDING UPON THE COURTS UNLESS ARBITRARY, CAPRICIOUS, OR NOT BASED UPON SUBSTANTIAL EVIDENCE

In Section 1 of the Railway Labor Act Congress specifically authorized the Interstate Commerce

Commission to determine which lines operated by electric power fell within the exemption proviso for interurban electric railroads. This Court has decided in numerous cases that in such circumstances decisions of the Interstate Commerce Commission[6] as well as of other administrative bodies[7] may not be ignored by the courts—that such decisions are binding, at least if supported by substantial evidence, and are neither arbitrary nor capricious.

A long line of authorities plainly establishes that "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it" (*Virginian Ry Co.* v. *United States*, 272 U. S. 658,

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[6] *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Pennsylvania Company* v. *United States*, 236 U. S. 351; *Florida* v. *United States*, 292 U. S. 1; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 314; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775.

[7] *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *St. Joseph Stockyards Co* v. *United States*, 298 U. S. 38, 51; *Acker* v. *United States*, 298 U. S. 426, 434; *Morgan* v. *United States*, 298 U. S. 468, 477; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Decatur* v. *Paulding*, 14 Pet. 497; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479; *Lewis* v. *Frick*, 233 U. S. 291; *Tang Tun* v. *Edsell*, 223 U. S. 673.

665), and that "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304.)

The lower courts in the instant case refused to recognize these established principles. While they did not challenge the accuracy of any of the specific facts found by the Commission, they permitted the case to be tried *de novo* without limiting the proof as to the status of respondent to the record before the Interstate Commerce Commission. Although the findings of the trial court* and the

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*The District Court gave no statement of the reasons which impelled it to ignore the determination of the Interstate Commerce Commission. Its findings state only that "the uncontradicted evidence" before the court and before the Interstate Commerce Commission "shows that plaintiff * * * is now and ever since its construction has been an interurban electric railway" and that the determination of the Interstate Commerce Commission to the contrary "is contrary to and is against the law." (R. 67–68.) That this finding was not intended to be a ruling that the Interstate Commerce Commission acted without evidence to support its decision was indicated by the following colloquy between the court and counsel at the end of the trial (R. 149):

"Mr. THOMAS: Our position is, unless this court can find that the Interstate Commerce Commission lacked authority, failed to give a due hearing, or acted without any evidence to support it, that its findings cannot be contradicted by the court.

"The COURT: I am going to give you the leeway on that. I am not going to go outside of the terms of this record to make any negative finding one way or the other."

opinion of the majority of the Circuit Court of Appeals* are somewhat confusing on the point, it does not appear that either court stated that there was no substantial evidence to support the conclusion reached by the Commission. Nevertheless, the majority of the Circuit Court of Appeals upheld the action of the District Court in exercising its own independent judgment on the question of whether respondent was an interurban railway, and in failing to give any weight whatsoever to the ruling of the Commission to the contrary.

Judges Lewis and Williams were of opinion that the Commission was authorized by the statute only to determine whether interurban electric railways are operated as a part of a general steam-railway system of transportation, not to determine whether a particular electric railway is an interurban, and that accordingly they were not bound by the Commission's decision on the latter question. This

*The opinion of Judge Lewis states that (R. 330): "The Commission arrived at its conclusion solely on its own estimate of the facts and not because of any direct testimony that the line was not in fact an interurban electric railway. There was none, but there was direct, positive proof by at least one competent, qualified witness that it was and at all times has been an interurban electric railway." This might be regarded as holding that there was no evidence before the Commission that respondent was not an interurban railway because the general manager of respondent, who was the only witness, said that respondent was an interurban, and no one testified to the contrary. According to this view the facts as to how respondent operated its line would be entitled to no weight as against such an expression of opinion.

construction of the statute, which had never previously been suggested by counsel for respondent, is plainly untenable. The statute authorizes the Interstate Commerce Commission "to determine after hearing whether any line operated by electric power falls within the terms of this proviso." The proviso exempts:

1. Any street, interurban, or suburban electric railway,
2. Unless such railway is operating as a part of a general steam-railroad system of transportation,
3. But shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

If an electric railway is not a street, interurban or suburban railway, it cannot fall within the proviso. Accordingly, if the Commission is to determine which lines operated by electric power fall within the proviso, it must decide whether the lines are street, interurban or suburban. Cf. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299.

Respondent may argue that the ordinary limitations upon the scope of judicial review of administrative decisions are not applicable here because (1) the determination by the Commission in this case is one of law rather than one of fact; (2) in cases arising under other statutory exemptions for interurban railways, the courts have determined

for themselves what carriers came within the exemptions; (3) the statute does not specifically state that the Commission's findings shall be binding upon the courts; (4) the constitutionality of the statute is attacked in this case; and (5) this is not a proceeding to set aside an order of the Interstate Commerce Commission but one to enjoin the United States Attorney. We shall take up each of these contentions in turn and show that none of them justifies disregarding the Commission's determination.

(1) Respondent may contend that inasmuch as none of the facts as to the manner in which it carries on its business are in dispute, the determination as to whether those facts make it an interurban railway is one of law rather than one of fact, and therefore for the courts to decide. That the question is one of fact and not one of law was settled by this Court in *Shannahan* v. *United States*, 303 U. S. 596, 599, wherein the Court declared with respect to this very statutory provision:

> The function of the Commission is limited to the determination of a fact.[10]

In any event, the complete answer to the argument was given in *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, in response to a

[10] The ruling to the contrary by Judge Woolsey of the Southern District of New York in *Hudson & Manhattan R. Co.* v. *Hardy*, 22 F. Supp. 105, was rendered before the decision of this Court in the *Shannahan* case.

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similar contention that the courts need not accept the decision of the Interstate Commerce Commission as to the meaning of "undue preference" where the facts were undisputed. The Court there declared (235 U. S. at 330), in language equally applicable here:

> * * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so*, obviously exerted an authority not conferred upon it by the statute. * * * It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. [Italics supplied.]

(2) Respondent has referred to *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, in both of which this Court decided for itself whether a particular carrier was an interurban railway, and to *United States* v. *Idaho*, 298 U. S. 105, in which the Court upheld independent judicial determination of the analogous question of whether a particular branch line constituted a spur track.

These cases have no application here, inasmuch as the provisions of the Interstate Commerce Act

under which they arose did not authorize the Commission to make the determination as to which carriers fell within their terms. This omission is, of course, vital. A statute which directs the Commission to determine which carriers are interurban electric railways is fundamentally different, with respect to the weight to be given the decision of the Commission made thereunder, from one which does not."

Before the passage of the amendments to the Railway Labor Act in 1934, various sections of the Interstate Commerce Act and other statutes regulating the railroads (including the original Railway Labor Act of 1926) had exempted "street,

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" Respondent argues that the Commission was authorized to determine the application of the exemption proviso in Section 1 (22) of the Interstate Commerce Act because of its power to "pass incidentally" upon the question when an application for a certificate of convenience and necessity is before it. But the case from which the quoted phrase is taken (*Texas and Pacific Ry. Co.* v. *Gulf, Colorado and S. F. Ry. Co.*, 270 U. S. 266, 272), as well as the subsequent decisions of this Court in *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469, and *United States* v. *Idaho*, 298 U. S. 105, demonstrate that that exemption proviso established a limitation upon the Commission's jurisdiction, the scope of which was not to be determined (except incidentally, in which case it was not binding upon the courts) by the Commission itself. In *United States* v. *Idaho*, this Court pointed out that the question of (298 U. S. at 109) "whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

interurban, or suburban electric railways not operating as a part of a general steam railroad system of transportation." Interstate Commerce Act, Secs. 1 (22), 20a (1); Locomotive Inspection Act, Sec. 1, 43 Stat. 659, U. S. C., Title 45, Sec. 22; Transportation Act of 1920, Sec. 300, 41 Stat. 469; Railway Labor Act of 1926, Sec. 1, 44 Stat. 577. These statutes did not authorize the Interstate Commerce Commission to determine which lines operated by electric power came within the terms of the exemption. On the contrary, they imposed limitations upon the jurisdiction of the Commission, and the duty of construing them necessarily devolved upon the courts and not upon the Commission itself. The *Piedmont, Chicago North Shore* and *Idaho* cases, arising under such provisions of the Commerce Act, were concerned with the jurisdiction of the Commission, a question which the statute did not authorize the Commission to decide for itself; accordingly, in those cases the Court did not pass upon the status of a particular property under the Act by way of review of the Commission's determination, but *de novo*.

This form of statutory exemption for interurban electric railways raised serious administrative difficulties when applied to those railroads which in some respects resembled interurban railways and in other respects ordinary commercial roads. Neither the carriers nor the Commission could be assured in advance of final judicial determination whether any particular line of electric railway was

subject to the Act.[13] The Commission repeatedly pointed out that the statutory language was unsatisfactory, and urged that it be made more specific.[14]

Experience under the Railway Labor Act of 1926 apparently demonstrated the advisability of establishing a mechanism by which it could be determined in advance of proceedings under the statute which of these electric railways were subject to the Act and which came within the exemption. When the 1934 amendments were under consideration by Congress, the Board of Mediation recommended that the Interstate Commerce Commission, which was more experienced in such matters than the Board itself, be authorized to make such a determination.[14] Accordingly, the Act was amended so as to *authorize* and *direct* the Interstate Commerce Commission to decide which carriers were exempted by the proviso. The advantage of having all such questions decided by a single body "in-

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[13] The confusion resulting from this uncertainty appears in both the *Piedmont* and *Chicago North Shore* cases. In the former the carrier was required to begin construction of a new line of road before it could obtain a judicial determination that it did not come within the exemption and that the construction was illegal; in the latter, a decision that the carrier was subject to the Act might have invalidated millions of dollars of securities previously issued.

[14] See excerpts from Annual Reports of the Interstate Commerce Commission, 1921 through 1935 (R. 246–260).

[14] See Hearings before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 3266, pp. 22, 162; Hearings before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, pp. 22, 84.

formed by experience" seems obvious. Cf. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454; *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Virginian Railway Co. v. United States*, 272 U. S. 658, 665.

The Railway Labor Act thus differs from the earlier statutory provisions exempting street, suburban, and interurban electric railways in that it *expressly authorizes* the Interstate Commerce Commission to decide what carriers come within the exemption. This added provision will be completely nullified if the courts can ignore the decisions of the Commission. Disregard for the express words of the statute certainly can not be justified on the authority of cases construing statutory exemptions which do not contain any comparable language.

(3) Counsel for respondent urged in its brief in opposition to the granting of a writ of certiorari that the determination of the Interstate Commerce Commission is not binding upon the courts because Congress has not stated expressly that it was to be binding or in any other manner defined the scope of judicial review. This argument would make a Congressional grant of authority to an administrative body a futility unless Congress also specifically provided that the courts shall accept the administrative determination and not decide the question *de novo*. But when Congress authorizes and directs an administrative agency to decide a question of fact, its plain intention is that the

agency and not the courts decide the question, even in the absence of an express limitation on the courts' right of review.

In none of the decisions cited above (p. 19) supporting the general principle as to the scope of judicial review was there a specific legislative limitation upon the power of the courts. Deliberately omitted from that list of authorities were cases arising under such statutes as the Federal Trade Commission Act and the National Labor Relations Act, which provide specifically that the findings of the administrative body shall be conclusive if supported by evidence. The Interstate Commerce Act contains no such provision.

Respondent claims, however, that the provision in Section 16 (12) of the Interstate Commerce Act that, in suits in equity to enforce orders of the Commission made under that Act, the court shall enforce the order "If, after hearing, that court determines that the order was regularly made and duly served," is the equivalent of a statutory prescription of the scope of judicial review. The language quoted, it should be observed, deals only with the formal requisites bearing upon the validity of the Commission's orders, and then only with respect to equity suits brought to enforce such orders. It does not apply to suits for penalties and suits to enjoin the enforcement of orders of the Interstate Commerce Commission; such suits are controlled by different statutory provisions not

containing the language upon which respondent relies. The scope of judicial review of Interstate Commerce Commission decisions has been defined in suits under the Urgent Deficiencies Act to set aside orders of the Commission, and not in suits brought under Section 16 (12).

That the provision quoted does not have the significance respondent attaches to it is shown by the fact that the long line of decisions defining the scope of judicial review in Interstate Commerce Commission cases does not rely upon it. These decisions did not create a novel doctrine; the rule applied by the courts to Interstate Commerce Commission decisions had been previously established in cases involving other administrative agencies. It stems from such cases as *Kendall* v. *United States*, 12 Pet. 524; *Decatur* v. *Paulding*, 14 Pet. 497; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, and *Gaines* v. *Thompson*, 7 Wall. 347, all of which hold that the discretionary acts of executive officers may not be independently reviewed by the courts. The doctrine was stated in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–110, as follows:

> But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by

the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. * * *

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

This rule has been applied not only in Interstate Commerce Commission cases, but generally. It was applied to an order of the Secretary of Agriculture defining the meaning of sausage in *Houston v. St. Louis Independent Packing Company*, 249 U. S. 479, 484, despite the absence of any statutory provision whatsoever determining the scope of judicial review.

These decisions are emphasized because they completely refute the argument that only when Congress has expressly so provided are administrative decisions binding unless arbitrary or unsupported by evidence. They show that the decisions under the Interstate Commerce Act, Packers and Stockyards Act and Shipping Act cannot be explained away on the premise suggested by plaintiff. They demonstrate that all that is necessary to

involve judicial recognition of the powers of administrative officers is a legislative mandate authorizing an administrative agency to determine a particular matter.

Respondent has suggested that such cases as the "sausage" case, which do not arise under statutes providing that administrative orders shall be enforced if "regularly made and duly served," are distinguishable because they deal with the regulations of an executive department rather than of an independent administrative body. The claim is that the acts of cabinet officers have a different status than those of other administrative officials because of the statute providing that:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. [1 Stat. 28, 17 Stat. 283, 5 U. S. C., Sec. 22.]

But the provision quoted plainly does no more than *authorize* the making of regulations, just as Section 1 of the Railway Labor Act *authorizes* the Interstate Commerce Commission to make a particular determination. The former prescribes the scope of judicial review no more than does the latter.

The opposing argument reduces itself to the proposition that the acts of cabinet officers have for some unexplained reason a standing before the courts superior to those of administrative bodies. There is no intrinsic reason why this should be so; on the contrary, every consideration of policy would require that the decisions of expert quasi-judicial administrative agencies should be given at least equal weight. The decisions of this Court indicate that the same principles apply to the acts of cabinet officers and of other agencies. Cf. *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1; *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433.

(4) Respondent contends that the courts must make an independent determination of the status of electric railways whenever the constitutionality of the underlying statute is attacked. The cases relating to the determination of so-called questions of constitutional fact (e. g., confiscation) are cited. *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *Crowell* v. *Benson*, 285 U. S. 22.

This argument completely misapprehends the meaning of those decisions. They hold only that when a fact to be determined itself establishes constitutional rights, the courts may exercise their independent judgment; the principle has found expression only with respect to those facts which determine whether an administrative body has acted within its constitutional power.

Here the question whether respondent is an interurban railway is clearly not one of constitutional fact. Inasmuch as respondent is admittedly engaging in interstate commerce, the Interstate Commerce Commission has constitutional jurisdiction to make the determination authorized by the Railway Labor Act. The substance of respondent's argument is that if the constitutionality of a statute is attacked in a case, all questions of fact in the case (or at least those which might determine the result in favor of the respondent on other than constitutional grounds) automatically become "constitutional facts" which must be determined *de novo* by the courts. Thus, it is urged, by alleging unconstitutionality (at least when in good faith) a complainant might deprive the determination of an administrative body of any weight, though such determination would otherwise be controlling. Such a proposition surely finds no support either in the reasoning or the holding of the *St. Joseph Stockyards Case*, of *Crowell* v. *Benson*, or of any other decision with which we are familiar. It is inconsistent with numerous recent cases such as *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142; and *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, in each of which the Court held that the findings of fact of the administrative

gency supported by evidence were conclusive despite an attack upon the constitutionality of the statute.

(5) The apparent theory of respondent's case was that the determination of the Commission could be ignored if the suit was brought against the United States Attorney to prevent enforcement of the Act rather than directly against the order of the Commission.[15]

The substance of this astounding proposition is that the Commission's findings should be ignored in a collateral attack although if directly attacked they would be conclusive unless arbitrary or unsupported by evidence. The argument that the decision of the Commission has *less* weight in a collateral than in a direct attack apparently attempts to reverse the usual rule against collateral attacks upon administrative or judicial proceedings. Such an argument is plainly untenable. *Cf. Butte, Anaconda & Pac. R. R. Co.* v. *United States*, 290 U. S. 127; *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144;[16] *Moore* v. *Robbins*, 96 U. S. 530; *Stewart* v. *McHarry*, 159 U. S. 643, 650; *Marquez* v. *Frisbie*, 101 U. S. 473; *Tang Tun* v. *Edsell*, 223 U. S. 673.

[15] Nowhere in the bill of complaint (R. 1–12), amended bill (R. 17–27), or amendment to the bill (R. 29–32) is the order of the Commission mentioned.

[16] In these two cases, in which the validity of a ruling of the Interstate Commerce Commission was assailed in a suit at law, the Court held that the Commission's decision was absolutely binding upon the courts. See pp. 37–38, *infra*.

A direct attack on the decision of the Interstate Commerce Commission, before a three-judge court in the manner prescribed by the Urgent Deficiencies Act (Act of October 22, 1913, c. 32, 38 Stat. 208, 219), will not lie. *Shannahan* v. *United States, supra.* No other method of directly assailing the Commission's determination would seem to be available. The question of the validity of the Commission's findings can, therefore, only come before a court in a proceeding in which they are collaterally involved. Such a proceeding might be a criminal prosecution under Section 10 of the Act or a suit to enjoin criminal prosecution,[17] or a civil action to enforce the Act [18] or to prevent enforcement of an order of the National Mediation Board.[19]

If the determination of the Commission is not to be given effect in such cases, it can have no effect at all. Since there can be no other kind of attack, the result of granting a trial *de novo* in all cases in which the Commission's findings are only before the court collaterally will be to render entirely nugatory the statutory provision authorizing and directing the Commission to make the determination.

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[17] See for example *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2) 458, cert. den., 300 U. S. 659.

[18] See for example *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515.

[19] See for example *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F. (2d) 757.

Respondent insists that since this is a suit to enjoin criminal prosecution, its status must be determined upon the same basis as in a criminal action, and that in such an action the Sixth Amendment would require the question to be determined independently by the court itself. Acceptance of this position would mean that no criminal penalties could ever be imposed for violation of orders of administrative bodies without permitting the criminal court to retry *de novo* all the questions previously administratively determined. This is plainly not the law. Cf. *United States* v. *Grimaud*, 220 U. S. 506; *Houston* v. *St. Louis Independent Packing Company*, 249 U. S. 479.

B. THE DETERMINATION OF THE INTERSTATE COMMERCE COMMISSION SHOULD BE FINAL IF MADE AFTER A HEARING

Although our primary position is that the determination of the Interstate Commerce Commission is binding upon the courts unless arbitrary, capricious, or unsupported by substantial evidence, we suggest to the Court that the scope of judicial review of the Commission's determination, under Section 1, First, of the Railway Labor Act may be even more restricted.

The function of the Interstate Commerce Commission under the Railway Labor Act is not to regulate, but merely to decide a question of fact which will determine whether particular electric

railways are subject to the jurisdiction of one administrative agency or another. The Commission enters no order; its duty in making the determination is purely legislative, and entirely different from its ordinary task of fixing rates and making other administrative rulings. This Court has held in cases arising under other statutes that when the Interstate Commerce Commission, acting outside its regulatory capacity, is authorized to determine questions of fact for other executive agencies, its determination is not subject to review by the courts. *Butte, Anaconda & Pacific R. Co.* v. *United States*, 290 U. S. 127, 143; cf. *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172.

Inasmuch as Section 1, First, of the Railway Labor Act requires the Commission to make its determination "after hearing", the Commission's decision would not be binding unless made after a hearing. A court would thus have power to determine whether any of the necessary requisites of a fair hearing were lacking. The court could thus determine whether the parties were given notice and an opportunity to be heard, to introduce evidence and to cross-examine witnesses, and whether the decision was based upon evidence introduced at the hearing. If these requisites are satisfied, as they plainly are in the instant case, the Commission's determination should be conclusive.

II

The Determination by the Interstate Commerce Commission That Respondent Was Not an Interurban Electric Railway Is Supported by Substantial Evidence and Is Neither Arbitrary nor Capricious

The opinion rendered by the Interstate Commerce Commission speaks for itself, and it is unnecessary to argue at length that it is neither arbitrary, capricious, nor unreasonable, and that it is based upon substantial evidence. The fairness and reasonableness of the opinion, the painstaking care with which the Commission analyzed and gave consideration to all of the evidence before it, and the factual bases of the decision are all manifest upon its face. When a carrier earns only 13.7% of its total transportation revenue from passenger traffic, a decision that it is not an interurban railway is supported both by substantial evidence and by the weight of the evidence as well. Even if the scope of judicial review were not so strictly limited, the decision of the Commission should be upheld.

Respondent argues, however, that there is no evidence to support the Commission's conclusion (1) because the physical characteristics of the line are those of interurban railways, and (2) because most of the freight carried is "peculiarly local" (brief in opposition, page 46).

(1) Respondent's main argument is that because it is physically incapable of hauling trains as long as those operated by the steam railroads, it must be regarded as interurban regardless of how much freight it carries. Since, under this view, the physical characteristics of the line are controlling, it is claimed that the Interstate Commerce Commission erred in attributing any weight at all to the amount and kind of freight business done by respondent and that the evidence as to such matters cannot support the Commission's conclusion. The standard which respondent thus insists be accepted is much too simplified. Many factors must be taken into consideration in determining whether a carrier is or is not an interurban. The physical characteristics of the road are among these factors. But clearly, evidence showing what respondent carries, how the transportation service is tied in with that of the steam roads, what proportion of its revenue is derived from freight of the same kind as that carried by the steam roads, and other similar items are entitled to consideration and are evidence supporting any decision the Commission may reach. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, this Court recognized that both types of facts must be considered, and in doing so indicated that the kind of business done was of primary importance. Whether most important or not, however, a decision based upon such facts can hardly

be regarded as without substantial evidence to support it.

(2) Respondent attempts to minimize the importance of its freight traffic by asserting that the freight service is primarily local in nature. In fact, respondent goes so far as to assert that all but about 10% of the freight cars moved are tied into "respondent's peculiarly local service" (brief in opposition, pp. 45–46).

A description of what respondent includes in its designation of "peculiarly local" traffic demonstrates the lack of foundation for this argument. Respondent describes as local all shipments of agricultural materials delivered to processing plants on its lines, all shipments of products used in processing agricultural commodities and of other kinds of agricultural supplies, all shipments of agricultural products to market, and all shipments of building materials to processing plants (*ibid*, R. 139–140). The record indicates that a large proportion of the products so described were shipped to or from respondent's lines in interstate commerce on the steam roads. Cf. R. 233–234. A definition of "local" or "interurban" traffic which includes all shipments in interstate commerce of food products or of material to be used in the processing of such products plainly contravenes all prior legal and popular conceptions as to the meaning of those terms.

The figures presented by respondent are further distorted by the double inclusion of the only freight

traffic which might legitimately be termed "local" is that which both originates and is delivered on respondent's line. To secure the figure of only 10% nonlocal transportation out of "8693" cars, respondent includes the 2336 cars which respondent did not interchange with other lines [20] both in the 4373 cars received by respondent and in the 4020 cars originated upon respondent's line.[21] See brief in opposition, pages 44–46; cf. R. 141. The nature of respondent's business in 1935 is not truly shown by these exaggerated figures based upon respondent's peculiar definition of local service, but by the admitted fact that of the 6357 (not 8693) cars transported by respondent, 4021 or 63% were interchanged with the trunk line railroads and, accordingly, must have constituted the same kind of traffic as is carried by such roads and not traffic peculiarly interurban or local in nature (R. 141).[22] Thus not 10% but 63% of respondent's freight traffic cannot be regarded as part of a peculiarly interurban service.

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[20] Presumably the special services provided by respondent (see p. 9, *supra*) are included in the figures of traffic not interchanged with other lines.

[21] These figures were for the last half of 1935. The figures considered by the Commission (p. 8, *supra*) were for the last half of 1934 (R. 233–234, 319–320), these being the latest figures offered in evidence before it. The 1935 figures were offered in evidence by respondent in the district court (R. 139–141). The slight difference between the 1934 and 1935 figures would not seem to be material.

[22] 2,450 of these 4,021 cars moved in interstate commerce (R. 139–140).

That the conclusion reached by the Interstate Commerce Commission was neither arbitrary nor capricious is demonstrated by an analysis of the previous decisions of this Court and of the Commission itself determining the meaning of "interurban electric railway".

The Decisions of This Court. This Court has, on two occasions, determined the application of similar exemptions for interurban railways. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Mil. R. Co.*, 288 U. S. 1. In both cases the Court recognized that interurban railways were lines "chiefly devoted to passenger traffic" (286 U. S. at 307). In each case the Court pointed out that "it is not always easy to draw the line," that "Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception * * *." See 286 U. S. at page 312; 288 U. S. at page 10. The *Piedmont & Northern*, 94.5% of whose revenue came from freight traffic, was "not such a case" (286 U. S. at page 312). It clearly was not an interurban. The *Chicago North Shore* case dealt with the application of Section 20a of the Interstate Commerce Act to a carrier 76% of whose revenue was derived from passenger traffic and only 22% from freight. The latter carrier was regarded by the Court as presenting a borderline case. The Court conceded "that the proper classification of

the railway is not free from difficulty." (See 288 U. S. 1, at page 13.) Doubt was removed in that case by prior administrative construction of Section 20a as applied to the particular carrier involved (288 U. S. at page 13).

The Utah Idaho Central, with over 80% of its revenue derived from freight traffic, falls between the *Piedmont & Northern*—the easy case—and the *Chicago North Shore*—the borderline case. It is not so clearly a standard freight railway as the Piedmont, because the latter, in addition to carrying even a larger proportion of freight traffic, was part of an interstate through route with steam carriers, and was of somewhat heavier construction.[20] On the other hand, the Utah Idaho Central is clearly much less like an interurban than the Chicago North Shore, which was described by this Court as follows (288 U. S. at page 10):

> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. *The freight business is subsidiary to this primary function,* and is not fairly comparable to that ordinarily transacted by a standard steam railroad. *Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline*

[20] Its locomotives, though lighter than those on steam lines, were heavier than those of the Utah Idaho Central, and could haul longer freight trains.

freight business. The main terminals serves only the passenger and merchandise freight traffic.

We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. [Italics supplied.]

The Utah Idaho Central never was predominantly a passenger line, with its freight business "subsidiary to this primary function"—the carriage of passengers. Certainly it cannot be so regarded at the present time when only 13.7% of its transportation revenue is derived from passenger traffic.

With the *Piedmont* presenting an easy case and the *Chicago North Shore* a close one, and the respondent falling between and not possessing the chief characteristics which made the North Shore an interurban,[24] it would seem that under this

[24] Many of the facts which, according to respondent, show that it is an interurban, were also present in the *Piedmont* case. The carrier there argued, just as respondent does here, that it was an interurban because some of its trackage was laid on city streets and operated jointly with street car lines, its motive power was electric, lower voltage and smaller power capacity were employed than on standard steam lines, the signal system was not suitable for use on standard steam lines, the electric locomotives were lighter, and the passenger cars were self-propelled rather than drawn by locomotives. (See 286 U. S. at page 308.) These factors

Court's decisions respondent was properly classified as not being an interurban railway. Thus, even if the question was to be decided *de novo* by the courts, without giving any weight to the Interstate Commerce Commission decision, it would appear that the Commission, rather than the court below, correctly applied the principles laid down by this Court.

But as has been pointed out (pp. 18–20, *supra*), in this case it is not necessary to go that far. The scope of judicial review is different under the Railway Labor Act than under the sections of the Interstate Commerce Act involved in the *Piedmont* and *North Shore* cases, which did not authorize the Interstate Commerce Commission to make the determination. The only question here is whether the Commission's decision was arbitrary, capricious or unsupported by the evidence. Regardless of whether or not a court would reach the same conclusion, there can be no doubt at all that the Commission's finding satisfies this test.

The Commission's previous interpretations of the term "interurban electric railway".—In a number of cases during the 12 years preceding the 1934 amendments to the Railway Labor Act, the Interstate Commerce Commission had been called upon to decide what carriers were interurban elec-

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were deemed by the Court to be outweighed by the fact that the carrier was engaged mainly in carrying freight, and that its line and equipment had been adapted to the carriage of freight. (See 286 U. S. 308–9.)

tric railways within the meaning of various exemption provisos in the Interstate Commerce and related Acts. In these cases the Commission had formulated and frequently stated its views as to those factors which determined whether a railway was an interurban. When Congress chose the Commission to make the determination under the Railway Labor Act, the inescapable inference is that it approved the principles which the Commission had previously followed in deciding such cases.[35] If Congress intended the Commission to adopt other standards than the ones it had already established, it would presumably have so stated in the Act.

As early as 1922, in a case holding that the Sacramento Northern Railway was not an interurban within the meaning of the exemption in Section 20a,[36] the Commission described the basic charac-

[35] This inference is confirmed by the fact that different tests had been applied by other agencies. There was a distinct conflict between the doctrine applied by the Commission and that applied by the old Railroad Labor Board, established under the defunct Title III of the Transportation Act of 1920, which held that a number of carriers (including the Piedmont & Northern) engaged to a large extent in transporting freight were interurbans. See *United States Railway Labor Board Decisions*, Vol. I, p. 53, Dec. No. 33.

[36] The title of the case is *In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad*, 71 I. C. C. 653.

teristics of interurban railways as follows (71 I. C. C. at 656-657):

> We are by no means convinced, however, that the Northern is an interurban electric railway as that term is used in the statute. Much of the transportation service rendered by it, no doubt, is similar to that rendered by electric interurban railways. *The service of such railways, however, is distinguished by its local and limited character and by the fact that the bulk of their revenues are derived from the transportation of passengers.* Their facilities for handling freight are usually inadequate or lacking so as to disable them from engaging in its general transportation. The amount of business interchanged by them with connecting carriers is ordinarily very small. [Italics supplied.]

The Sacramento was held not to be an interurban largely because:

> Since the time of its organization its revenues from freight, mail, and express have exceeded those received from the transportation of passengers. Indeed its revenue from freight alone has been practically equal to its passenger revenue.

This decision was re-affirmed on rehearing in 1923. See *Proposed Control of Sacramento Northern by Western Pacific Railroad*, 79 I. C. C. 782.

In a case decided in 1924, the Commission described the distinguishing features of an inter-

urban railway as follows (*Application of Section 15A of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751, 753):

> Interurban electric railways, on the contrary, are frequently constructed in large part in public streets or highways. The bulk of their revenues is usually derived from passenger traffic directly subject to State regulation. Their owned equipment, as a rule, is not interchangeable with steam roads. The nature of their construction and local law frequently prevent more than limited use on their lines of the equipment of steam-railroad connections.

In 1927, in a case involving the application of a similar proviso in the Locomotive Inspection Act (43 Stat. 659, U. S. C., Title 45, Sec. 22) to a number of electric railways, including respondent, the Commission again construed the exemption for interurban railway not to cover general carriers of freight. See *In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other Than Steam Power*, 122 I. C. C. 414. Respondent was a party to that proceeding and was specifically found not to be an interurban railway. The Commission said (at pp. 424–425):

> It is well known that electric cars were at first confined to street service in cities and towns. Gradually the lines were extended to the suburbs. Next came the idea of ex-

tending the lines from city to city. These three steps gave rise to the terms street, suburban, and interurban electric railways. *These lines were limited almost exclusively to carriage of passengers.* They were built largely upon streets and public highways. The only material difference between street, suburban, and interurban lines was the extent of the lines. *If the line extended from city to city it was termed an interurban although handling the same traffic and being operated in substantially the same manner as the street or suburban line.* We think this is the usual conception of the interurban line today.

Obviously the character of the lines may change without a change in the name of the operating company. The record here shows that the name of a carrier, whether it is called a railroad, traction system, interurban railway, or power and light company, indicates nothing as to the character of the line or the nature of the traffic handled. We must look to the substance of the matter. A line which today extends only between two cities, *and is dependent upon passenger traffic for the bulk of its revenues, might properly be termed an interurban line.* In a period of years it might through natural development or consolidation become a railway comparable with our steam railroads and still retain its original name. It would no longer, however, be an interurban

railway in substance and in fact. There would be a point, although not definitely defined, where the line passed beyond the true interurban. Such is the case with several of the lines here considered. They have developed into railways which are more than interurbans, and which do not fall fairly within the expression "street, suburban, and interurban electric railways" as used in this act. The distinguishing feature of their operation is that electric, instead of steam, motive power is used. We think such carriers are not excluded from the scope of the locomotive-inspection act, as amended. [Italics supplied.]

In the same year, the Commission held that the Piedmont & Northern was not an interurban electric railway within the meaning of the exemption proviso in Section 1 (22) of the Interstate Commerce Act. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363, 368-372.

These principles were re-affirmed in 1931 in *Railway Mail Pay: In the Matter of the Application of Illinois Terminal Company*, 174 I. C. C. 796, 799. The Commission there held, after quoting from the *Sacramento Northern* and *Locomotive Inspection Act* cases, that the Illinois Terminal Company was not entitled to the mail rates fixed for "interurban electric railway common carriers"

under the Act of July 2, 1918, 40 Stat. 748-9, U. S. C., Title 39, Sec. 570."

These decisions show a consistent course of interpretation of the phrase "interurban electric railways" by the Interstate Commerce Commission, before the enactment of the 1934 amendment to the Railway Labor Act, to the effect that electric railways, engaged to a large extent in the general transportation of freight, were not interurban. It seems plain that when Congress authorized the Commission to decide which electric railways were interurban for purposes of the Railway Labor Act, it did not intend or expect the Commission to depart from the principles previously laid down."

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[*] In its brief in the Circuit Court of Appeals (p. 35), respondent intimated that the companies involved in the Illinois Terminal were operated as part of a steam railway. The Commission's report (174 I. C. C. at 798) shows that 84% of the system was electrically operated. The case is cited here, not for its holding on the facts, but for its adherence to the doctrine previously set forth in the *Locomotive Inspection* case.

[**] In its report in the instant case, the Commission declared (quoting from its own prior decisions in *Texas Electric Railway*, 208 I. C. C. 193, and *Piedmont and N. Ry. Co.*, 211 I. C. C. 4) (R. 323-324):

"The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives,' supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. * * *

"Previous to the amendment to the Railway Labor Act on June 21, 1934, this Commission had passed upon the status

Respondent has claimed that the Commission has not been consistent in its decisions on this subject. The cases upon which respondent relies to prove the alleged inconsistency do not in any way conflict with the principles established in the cases previously discussed. A large number of the cases, decided between 1911 and 1915, dealt with the question whether the Commission could order the establishment of through routes with electric lines carrying freight. *Cincinnati & Columbus Traction Company* v. *Baltimore & Ohio Southwestern Railroad Company et al.*, 20 I. C. C. 486; *St. Louis, Springfield and Peoria Railroad et al.* v. *Peoria and Pekin Union Railway Company*, 26 I. C. C. 226; *Louisville Board of Trade et al.* v. *Indianapolis Columbus and Southern Traction Company et al.*,

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of numerous electric railways under more or less similar exemption provisions in other acts administered by us. Those decisions recognized a class of electric railways which were regarded as more than interurbans and were sometimes referred to as commercial railways operated by electric power. The distinction between them hinged largely upon the amount and character of freight business handled, an interurban being considered primarily a carrier of passengers and its freight traffic largely local. When Congress authorized this Commission to determine the status of electric railways under the Railway Labor Act, which is not otherwise administered by us, it is reasonable to suppose that it did so because of our experience in passing upon such questions under similar exemption provisions in other acts. This may also be regarded as a pretty good indication that Congress used the word "interurban" in the same sense as the Commission had interpreted that term in its decisions."

27 I. C. C. 499; *Chicago, Ottawa and Peoria Railway Company* v. *Chicago and Northwestern Ry. Co. et al.*, 33 I. C. C. 574. Since the provisions of the Interstate Commerce Commission Act involved contained no exception for interurban lines, it was immaterial in those cases whether the roads concerned were or were not interurban. No showing was made as to the proportion of freight carried. The Commission merely spoke about the electric lines concerned as interurbans, without, of course, making any ruling as to their status. In one typical case the Commission pointed out that, although the lines carried freight, they were "primarily carriers of passengers." *Louisville Board of Trade* v. *Indianapolis C. & S. Traction Co.*, 27 I. C. C. at 500. Such dicta are plainly not inconsistent with the more recent decisions already discussed.

Michigan R. Co. v. *Pere Marquette R. Co.*, 74 I. C. C. 496 (1922) was the same kind of case; in that case it appeared that the line in question derived only 24% of its revenues from freight. But there, too, whether or not the line was an interurban was not material to the decision the Commission was called upon to make. In *Application of Section 15 (a) to Interstate Public Service Co.*, 117 I. C. C. 228 (1926), the Commission held that a line which could not interchange its equipment with the steam roads, and which derived less than 24% of its revenue from freight, (and only 26% of that from carload freight), was not an interurban.

Neither of these cases is at all inconsistent with the Commission's present position. In the *Electric Railway Mail Pay Cases*, 58 I. C. C. 455 (1920), 98 I. C. C. 737 (1925), the Commission did not purport to consider the question of which electric lines were interurban.[39] See p. 60, *infra*.

Respondent argues that these cases and other publications, including reports of the Bureau of the Census (R. 260–266), show that interurban railways may carry freight, and that since the Commission now holds that no line carrying freight is interurban, the Commission has departed from its original position.

But it is clear that the Commission has never adopted the position respondent attributes to it; in its opinion in this very case the Commission concedes that interurban roads may carry freight without, for that reason alone, losing their status as interurbans (R. 424). When a road carries a relatively small portion of freight[40] or handles it in a manner entirely different from that in which it is

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[39] Respondent's brief in opposition (p. 51) contains a quotation from the first *Electric Railway Mail Pay* case purporting to show that the Commission there said that some *interurban* lines derived greater revenue from freight and express than from passenger business. The quotation consists of two passages, seventeen pages apart in the opinion quoted (58 I. C. C. 459, 476), neither of which *separately* has the meaning which would be drawn from the single quotation.

[40] *Michigan R. Co.* v. *Pere Marquette R. Co.*, 74 I. C. C. 496; cf. *United States* v. *Chicago North Shore and Milwaukee R. Co.*, 288 U. S. 1.

carried by the steam roads; or is unable freely to interchange the freight carried with the steam roads,[21] the Interstate Commerce Commission has not classified it as interurban. Conversely, when a road is engaged in the general transportation of freight as a substantial portion of its business, when such freight is carried in the same equipment as that of the steam railroads and is freely interchanged with them, and when the electric road participates in joint rates with the steam roads, the Commission holds that it is more than an interurban. In coming to this decision the Commission takes into consideration the factors stressed by the respondent but gives greater weight to those just described. Opinions may of course differ as to how much weight shall be given to each factor, but the decision must be made somewhere and under this statute Congress intended it to be made by the Interstate Commerce Commission.

That Congress was aware of the effect of permitting the Commission to make these determinations appears from the testimony before the congressional committees when the Act was pending. The delegation of authority to the Commission was supported by Mr. George M. Harrison, representing the railroad employees organizations, on the ground that it would definitely result in bringing

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[21] *Application of Section 15 (a) to Interstate Public Service Co.*, 117 I. C. C. 298.

within the Act such carriers as respondent." It was opposed by Mr. C. D. Cass, of counsel for respondent in this case, in behalf of the American

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"Mr. Harrison stated [Hearings, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, p. 84]:

"The next question in regard to the scope is that we have some railroads in this country that are operated by electric power. They are engaged in the general business of transporting freight and passengers and interchange that business with the steam railroads. They constitute a part of the general railroad system of the country.

* * * * * *

"Those railroads that I have in mind might properly be referred to as acting in the classes such as the Pacific Electric, the Piedmont and Northeastern, the Chicago South Shore & South Bend, the Oklahoma Railway, the Fort Dodge, Des Moines & Southern.

"We have no desire to bring under this bill the organization of ordinary street or interurban railroads and neither does the bill in our opinion do that.

"In order to make it sure that only such electric line railroads would come under the bill as are engaged in that character of service that makes them common carriers in the true sense, the bill provides that the Interstate Commerce Commission shall designate what particular electric railroad shall come under the scope of the bill." See also Hearings before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 3266, pp. 35, 162.

The Commission has held, for the same reasons as appear in its opinion in the instant case and in the face of the same objections, that each of the five carriers referred to by Mr. Harrison was not an interurban within the meaning of the Act. See *Pacific Electric Ry. Co.*, 215 I. C. C. 414; *Piedmont & Northern Ry. Co.*, 211 I. C. C. 4; *Chicago South Shore & South Bend R. R.*, 214 I. C. C. 167; *Oklahoma Ry. Co.*, 218 I. C. C. 123; *Fort Dodge, Des Moines & Southern Ry. Co.*, 211 I. C. C. 9.

Transit Association, because he feared that it would have the same result."

Respondent has referred to the repeated recommendations in the Annual Reports of the Interstate Commerce Commission from 1921 through 1935 (R. 246–260) that the exceptions in various parts of the Interstate Commerce Act for street, suburban, and interurban electric railways be amended so as specifically to exclude carriers engaged in the general transportation of freight, and argues that this shows that such electric railways were regarded as coming within the terms of the existing exemption provisions. Examination of these recommendations will indicate that their purpose was to make the law more definite and explicit rather than to alter it. That the Commission was seeking to clarify rather than to change the substance of the existing law seems obvious in view of its consistent interpretation of these provisions not to include such carriers during the very period in which it was making its recommendations. The contrary conclusion can be posited only on the assumption that the Commission regarded

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[11] See Hearings, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 3266, pp. 97–108. See also the statement of Charlton Ogburn and P. J. Shea, on behalf of the Amalgamated Association of Street and Electric Railway Employees, in which they opposed the authorization to the Commission on the ground that it might bring within the Railway Labor Act carriers whose employees were represented by their organization. See Hearings, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, pp. 107–110.

its *own decisions* construing the phrase "interurban electric railway" to exclude general carriers of freight as unauthorized and incorrect.

Previous administrative interpretation with respect to respondent. Prior to the holding here under review, the Commission had on only one occasion been called upon formally to determine respondent's status as an interurban; on that occasion (the *Locomotive Inspection Act* case, *supra*, pp. 49–51), the Commission found respondent not to be an interurban. The majority of the court below, however, was of the opinion that there had been a course of administrative interpretation of similar exemption provisos showing that the Commission regarded respondent as an interurban railway (R. 334). Respondent had called attention to the form of its reports to the Interstate Commerce Commission, to its classification under the Railway Mail Pay Act, and to its prior issuance of securities without Commission approval under Section 20a, and had claimed that it was not subject to the Federal Control Act.[34] A brief ex-

[34] Respondent also pointed out that in 1920 the now defunct Railroad Labor Board held that similar electric lines were interurban. United States Railroad Labor Board Decisions, Vol. I, p. 53, Dec. 33. Respondent was not a party to that decision, which has already been referred to. See page 47, *supra*. But, in any event, that decision is out of harmony both with the subsequent decisions of the Commission and with that of this Court in the *Piedmont* case. For the Piedmont & Northern was one of the carriers classified by the Railroad Labor Board as an interurban.

amination of these so-called administrative precedents will demonstrate that they do not support the conclusion respondent draws from them.

(a) Respondent's reports to the Commission have been filed on forms prescribed for "electric railways"—not on forms for "*interurban* electric railways" (R. 117–118). The Commission prescribes one form of reports for steam and one for all electric lines; the use of the latter by an electric railway obviously reveals nothing as to whether or not the Commission regards it as an interurban.

(*b*) The respondent has received pay for the transportation of mail under the rates prescribed for interurban railways (R. 313), but the Commission held no hearings and made no investigation or decision with respect to respondent's status under the Mail Pay Act. As the Commission declared in its opinion in the instant case (R. 322):

> The Utah Idaho Central is paid for carrying the mail at rates prescribed in *Electric Railway Mail Pay*, 58 I. C. C. 455, 98 I. C. C. 737, under an act applicable to "urban and interurban electric railway common carriers". The same is true of the other electric railways which have been found not to be interurbans within the exemption proviso in the Railway Labor Act, but the Commission has never determined the status of this or the other lines under the above-mentioned mail-pay act.

(c) The respondent did not obtain Commission approval of an issue of securities made during its

organization in 1926, as would have been required if it were subject to Section 20a (R. 117). Respondent did not request the Commission to approve the issuance of such securities, but in its annual report filed with the Commission in 1927 disclosed the fact that such securities had been issued (R. 112). In 1928, 1929 and 1930, the Bureau of Statistics and the Bureau of Accounts of the Commission corresponded with respondent with respect to the reorganization and issuance of the securities, requesting additional information and a change in the form of the account (R. 112–117)." No point was made by the Commission in any of these letters or otherwise that respondent had in 1926 failed to comply with Section 20a. Respondent relies entirely on this inaction, not upon any affirmative or considered ruling by the Commission itself, as showing that the Commission regarded it as an interurban. In view of the fact that in 1927 the Commission held in the *Locomotive Inspection Act* case (see p. 49, *supra*) that respondent was not an interurban, the negative inference which respondent seeks to draw from the

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These facts appear in the record in the district court were not shown in the evidence before the Interstate Commerce Commission. For that reason the court below could not have considered them. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 433–445. The Commission could not take notice of information in its files not introduced into evidence. *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.*, 227 U. S. 88, 93.

Commission's inaction under Section 20a during the same period is clearly dispelled.

(d) Respondent argued in its brief in the Circuit Court of Appeals that it was not brought under the Federal Control Act during the war because it was not an interurban railway. The Commission found it unnecessary to decide whether the carrier had in fact been under Federal control." What was done in 1918 by the Director General of Railroads under another statute and under different circumstances can not be deemed an administrative interpretation binding upon the Interstate Commerce Commission in 1933.

As contrasted with the above instances of administrative inaction, in the *Locomotive Inspection Act* case, *supra*, p. 49, upon formal consideration of a questionnaire filed by respondent," and in the instant case after a formal hearing the Commission held that respondent was not an interurban. These two considered rulings would seem to

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" The record is not clear as to whether respondent was subject to Federal control; the only official statement in the record bearing upon the question is a letter from the Director General which "relinquished" the carrier from Federal control (R. 228).

" Respondent attempts to distinguish the *Locomotive Inspection Act* case on the ground that the exemption in that statute did not contain the word "steam." But the word "steam" is only used in the portion of the proviso dealing with railways operating as "part of a general steam railroad system of transportation," not in the reference to interurban railway, and its presence or absence can not affect the meaning of "interurban electric railway."

be entitled to greater weight as administrative precedents than the proceedings under the Railway Mail Pay Act and the failure to act under Section 20a upon which respondent mainly relies. In any event, the most that can be said for respondent is that the administrative precedents are conflicting." With respect to this precise issue, this Court said in the *Piedmont* case (286 U. S. at 312):

> Only a word need be said with respect to the contention that governmental agencies have heretofore classified the railway as an interurban electric line. It is true that in connection with quite diverse administrative functions the United States Labor Board, the Postmaster General, and the Interstate Commerce Commission have classified petitioner's railway as an interurban electric line in distinction to steam railroads. Neither the administrative nor the statutory classification has, however, been uniform, and in any event is not controlling in this litigation.

Despite respondent's arguments, whenever its attention was directed to the question the Commission has consistently regarded the Utah Idaho and similar carriers as not coming within the exemptions for interurban electric railways in the

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[b] In *United States* v. *Chicago North Shore & Milwaukee Ry. Co.*, 288 U. S. 1, this Court gave effect to a *uniform* administrative interpretation of Section 20a in determining an electric railway's status under *that* section.

Interstate Commerce Act and related Acts. These views were known to the framers of the 1934 amendments to the Railway Labor Act. It would seem that the clear intention of Congress in changing the former law specifically to authorize the Commission to make the determination was that the Commission should follow the standards it had previously established. Selection by Congress of the Commission as the agency to decide the question would accordingly seem to constitute approval of the Commission's previous rulings on the subject.

Respondent introduced in evidence its charter (R. 235) and the ordinances passed by the various communities in which it operated granting it rights of way (R. 158). The charter authorizes respondent to operate railways "whether street or interurban, or railroads in general". The ordinances forbid the carrier to operate by steam; only in 8 out of 19 of the communities through which respondent operates did the ordinances describe the operations authorized as those of an interurban railway (R. 158). In any event the contents of state charters or local ordinances are irrelevant in determining the status of the carrier under Federal law. This Court has repeatedly held that the status of a carrier subject to federal regulation "does not depend upon whether its charter declares it to be a common carrier, nor upon whether

the State of incorporation considers it such; but upon what it does." *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *United States* v. *California*, 297 U. S. 175, 181; *New York* v. *United States* 257 U. S. 591.

Respondent has referred to several sections of Transportation Act, 1920 (41 Stat. 460, 469, 489, U. S. C., Title 49, Secs. 73, 77, 15a (1)), and to the Bankruptcy Act of 1933 (47 Stat. 1482, U. S. C., Title 11, Sec. 205 (m)), as impliedly recognizing that there might be interurban railways deriving over 50% of their revenues from the transportation of freight. It is sufficient to say with respect to this argument that Congress has employed over a period of years a number of different definitions of the electric railways exempt from various statutes regulating the railroads, that the diversity of these definitions indicates that Congress itself was in doubt as to how the exemption should best be drawn, and that in the three most recent statutes on the subject (the Railway Labor Act as amended in 1934, the Railroad Retirement Act and the Carriers Taxing Act) Congress has abandoned its former attempt at exact definition and left the question to the Interstate Commerce Commission to decide—unquestionably with knowledge of the manner in which the Commission had decided similar questions in the past.

III

The Constitutionality of the Railway L... Act

In its bill of complaint, filed and amend... fore the decision of this Court in *Virginian R... v. System Federation No. 40*, 300 U. S. 5... spondent challenged the constitutionality o... stantially all the important provisions o... Railway Labor Act, as amended in 1934 (R. ... 29–32). We do not know whether respond... tends to continue its attack upon the Act ... present time. Inasmuch as the validity of the ... ute can no longer be seriously disputed, it doe... seem necessary to prolong this brief by cons... tion of the constitutional question.

Conclusion

It is respectfully submitted that the judgm... the Circuit Court of Appeals should be rever...

Robert H. Jackson,
Solicitor General.

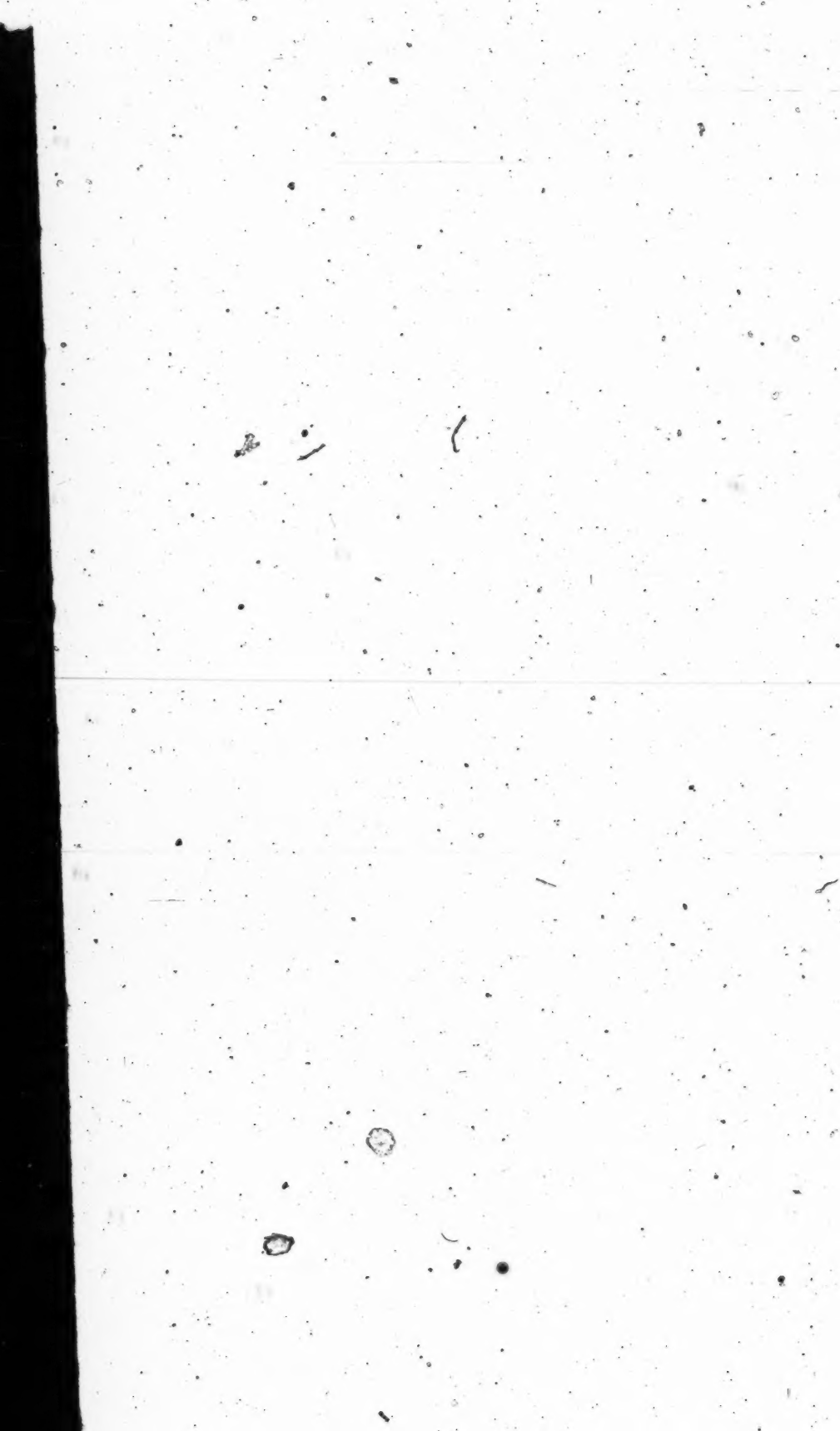
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In the Supreme Court of the United States

October Term, 1937

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION.

BRIEF OF RESPONDENT, THE UTAH IDAHO CENTRAL RAILROAD COMPANY, IN OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

INDEX

	Page
Statement of the Case	1
Questions Presented	6
Argument	6
1. It was the right and duty of the trial court to determine independently whether or not the respondent is an interurban railroad not subject to the provisions of the Act	6
2. There is no reason for granting the writ	65
Conclusion	68

Cases:

Baer vs. United States, 250 U. S. 273	62
Cincinnati & Columbus Traction Co. vs. Baltimore & Ohio Southwestern R. R. Co. et al, 20 I. C. C. 486	49
Chicago, Ottawa and Peoria Ry. Co. vs. Chicago & Northwestern Ry. Co. et al, 33 I. C. C. 574	50
Electric Railway Mail Pay Case, 58, I. C. C. 455	51
Electric Railway Mail Pay Case, 98, I. C. C. 737	51
Interstate Commerce Commission vs. Union Pacific Railroad Co., 222 U. S. 451	11
Louisville Board of Trade et al vs. Indianapolis, Columbus and Southern Traction Co. et al, 27 I. C. C. 499	50
Lucas, Comptroller vs. Bickell et al, 292 U. S. 415	62
Michigan R. R. Co. vs. Pere Marquette R. R. Co. et al, 74 I. C. C. 496	50
Modern Woodmen of the World vs. Casados, 15 Fed. Supp. 483	62, 64
Omaha & Council Bluffs Street Ry. Co. vs. Interstate Commerce Commission, 230 U. S. 324	55
Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission, 286 U. S. 299	14, 47-48, 55
Proposed Control of Sacramento Northern by Western Pacific Railroad, 71 I. C. C. 656	50
Rules for testing other than steam power locomotives, 122 I. C. C. 414	19, 50
St. Joseph Stockyards Co. vs. United States, 298 U. S. 38	63

Page

St. Louis, Springfield and Peoria Railroad et al vs. Peoria & Pekin Union Railway Company, 26 I. C. C. 499 8

Spokane & Inland Empire R. R. Co. vs. Interstate Commerce Commission, 241 U. S. 344 5

Siler vs. Louisville & N. R. Co., 213 U. S. 175 6

Swayne & Hoyt, Ltd. vs. United States, 300 U. S. 299 12

Shannahan et al, Trustees, vs. United States, 82 L. ed. 740 (not yet officially reported) 13

Texas & P. R. Co. vs. Gulf C. & S. Ry. Co., 270 U. S. 266 5

United States vs. Chicago, North Shore & Milwaukee R. Co., 288 U. S. 1 ..... 14, 16, 18, 57

United States vs. Idaho, 298 U. S. 105 14

Virginian Ry. Co. vs. United States, 272 U. S. 658 11

Virginian Ry. Co. vs. System Fed. No. 40, 300 U. S. 515 ..... 55, 56

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October Term, 1937

NO. 984

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BRIEF OF RESPONDENT, THE UTAH IDAHO CENTRAL RAILROAD COMPANY, IN OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

In their petition for a writ of certiorari herein, the petitioners, as it seems to us, did not clearly present the questions which are involved in this case. For that reason we are making a more elaborate statement of the case than we would ordinarily consider necessary in opposing the petition.

STATEMENT OF THE CASE

Paragraph Eighth of Section 2 of the Railway Labor Act provides that: Any carrier within the provisions of the Act shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board created by the Act; that all disputes between the carrier and its employees will be handled in accordance with the Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of said section.

Said paragraph Eighth of Section 2 further provides:

> "The provisions of said paragraphs are hereby made a part of the contract of employment between

the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreement between them."

Paragraph Third of Section 2 of said Railway Labor Act is as follows:

"*Third. Designation of representatives.*

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Paragraph Fourth of Section 2 of said Railway Labor Act is as follows:

"*Fourth. Organization and collective bargaining; Freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; defluction of dues from wages forbidden.*

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its

employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

aragraph Fifth of Section 2 of said Railway Labor as follows:

"Fifth. Agreements to join or not to join labor organizations forbidden.

No carriers, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

he Mediation Board prescribed the form of notices he times and places at which the same should be l by respondent, and if the respondent is subject Railway Labor Act it then became its duty to post tices as required by said paragraph Eighth of Section

2 of the Act; however, the respondent, claiming that it is an electric interurban railroad within the exemption proviso of the Act, and, accordingly, not a carrier within the meaning of the Act, refused to post the notices.

The Tenth paragraph of Section 2 of the Act makes it a misdemeanor on the part of any carrier subject to the Act, its officers or agents, to refuse and wilfully fail to comply with the third, fourth, fifth, seventh and eighth paragraphs of said Section 2, and upon conviction, the carrier, its officers or agents, offending is subject to a fine of not less than $1,000.00 or more than $20,000.00, or imprisonment for not more than six months, or both such fine and imprisonment, and each day during which such carrier, its officers or agents shall wilfully fail or refuse to comply with the terms of such paragraphs, shall constitute a separate offense; and it is made the duty of the District Attorney of the United States to prosecute such offenses upon the application of any duly designated representative of a carrier's employees.

Such a demand was duly made upon the petitioner District Attorney, he being the District Attorney for the District of Utah, and thereupon, he threatened to prosecute the respondent for failure to post the notices as required by the said paragraph eighth of said Section 2, and thereupon, the respondent brought this suit in the District Court of the United States for the District of Utah to enjoin the said District Attorney from instituting such prosecution, and claiming in its Bill of Complaint that it is an electric interurban railroad not subject to the Railway Labor Act, and claiming further that if it should be held subject to the Act, the Act is unconstitutional as to it, and alleging that if it fails to post the notices, as required by the Act, it will subject itself to prosecution for the penalties therein fixed, notwithstanding it is not a carrier subject thereto, and notwithstanding the Act, if applicable to it, is unconstitutional; that if it did comply it would thereby admit that it is subject to the provisions of the Act, and thus voluntarily submit itself thereto, and would suffer immediate and irreparable injury and damage;

such compliance will result in demands for increase in s and demands for rules and working conditions with ct thereto, which the respondent is unable to grant se its financial condition will not permit it so to do ut immediately impairing and ultimately destroying bility to operate and serve the public in the manner hich it has served it in the past; that the plaintiff never had any disputes with its employees which not been amicably adjusted, and notwithstanding it continually operated under contracts with organiza- of its employees which are independent of it and wise under its control as to pay, rules and working itions, because its employees will be influenced to don their present organization and to join those or- ations of employees of transcontinental steam roads ghout the country on the promise of such organiza- that they will receive the higher, or so-called steam- oad standard wages, and the different rules and ing conditions prevailing thereon.

The petitioner District Attorney answered the Bill omplaint by denying certain allegations thereof and ing affirmatively the determination of the Interstate merce Commission made pursuant to Section One, , of the Railway Labor Act, that the respondent was an interurban electric railroad within the meaning of exempting proviso, and which determination by the tate Commerce Commission will hereinafter be more referred to. The Interstate Commerce Commission permitted by the Court to, and did file its Petition ntervention in which it raised the same issues that raised by the Answer of the District Attorney, and h issues will likewise be hereinafter more fully referred The respondent replied to the affirmative Answer e District Attorney and the Petition in Intervention e Interstate Commerce Commission, and alleged that letermination of the Interstate Commerce Commission contrary to the uncontradicted evidence presented in hearing before it under the Section above referred hich matter will also hereinafter be more fully referred this brief.

The case went to trial upon the issues thus made, and no question was made either in the Trial Court or in the Circuit Court of Appeals, to which latter Court the case was subsequently appealed, by the petitioners herein, nor is any question made in this Court by the petitioners but that the respondent would suffer irreparable injury and damage if it complied with the Act, and no question was or has been made but that the District Attorney has threatened the prosecutions under the Act, as claimed, if respondent neglected or refused to post the notices as required by the Act.

QUESTIONS PRESENTED

The sole questions then before both lower courts were (1) whether or not the respondent is an electric interurban railroad not subject to the provisions of the Act and how that question shall be determined and (2) whether, if respondent is subject to the act, it would be unconstitutional as to it. The first question is also before this court upon the petition herein. If it be determined that the respondent is an interurban railroad and that fact was properly determined by the lower courts then there is no occasion to determine the constitutional questions, and the only other question is (2) whether there is any reason for granting the writ.

THE ARGUMENT

(1) It was the right and duty of the trial court to determine independently whether or not the respondent is an electric interurban railroad not subject to the provisions of the act.

It was and is our contention that it was the right and duty of the court independently to determine whether or not the respondent is an electric interurban railroad not subject to the act. If the criminal prosecutions which had been threatened had actually been brought, there would be two questions for the court, or the court and jury to determine. First, whether or not the respondent is a carrier subject to the act, and secondly, if it should be held that it is, then, whether or not it had posted the

notices as required by the act, both questions being essential to the determination of respondent's guilt, and there being no dispute but that the respondent had failed to post the notices, there would be only the first question to determine. Inasmuch as this suit is brought to prevent such prosecutions, there is left only the first question, and obviously that question must be determined upon the same basis as it would be determined in the criminal action. It will be observed from a reading of the provisions of the act that the authority and duty of the District Attorney to prosecute is not dependent upon any action or determination by any administrative body or tribunal; he could proceed to prosecute even if no such determination had been made; and, therefore, necessarily the determination whether or not respondent is a carrier within the act, both in the threatened criminal actions and in this suit to prevent them, must be an independent determination. Moreover, if it were held otherwise, the defendant would be deprived of its constitutional rights guaranteed under the Sixth Amendment of the Constitution of the United States, for if an administrative tribunal is empowered to determine one of the elements necessary to constitute the criminal offense in a proceeding in no way connected with the action in which the guilt of the accused is to be determined, and that determination is to be conclusive on the accused in his trial, then and by virtue of that fact his constitutional rights under the Sixth Amendment to the Constitution of the United States have been taken from him, and the same rule with respect to this matter must be followed in a suit to enjoin a criminal prosecution as in the criminal prosecution itself. Therefore it is the contention of the respondent, that as one of the elements of his guilt cannot be determined against him in a proceeding other than that in which his guilt or innocence is being determined, one of the elements necessary to prosecution under the act, to wit, respondent's status as a carrier within the act, cannot be determined against him in a proceeding other than that in which his injunctive relief is being sought.

However, the petitioners contend that no court has the right to make any such independent determination and

base their contention upon the following argument: That Section 1, First, of the Railway Labor Act provides as follows:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'; Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

That prior to bringing this suit, upon request of the Mediation Board, the Interstate Commerce Commission, after a hearing, determined that respondent is not an electric interurban railroad within the meaning of the exemption proviso, and that that determination, whether arbitrary, capricious, or not supported by substantial evidence, is nevertheless binding upon all the courts, and in any event that it is binding unless arbitrary, capricious, or not supported by substantial evidence, and that its

determination was not arbitrary, capricious, or not supported by substantial evidence.

It has been admitted by petitioners throughout this case and is now admitted, that the respondent is not operating as a part of a general steam-railroad system of transportation, and is not a part of the general railroad system of transportation operated by any other motive power. So that the issue thus raised by the claim of the petitioners is whether the determination by the Interstate Commerce Commission that respondent is not an electric interurban railroad is conclusive upon the courts, or is conclusive unless arbitrary, capricious, or not supported by substantial evidence.

For the first time in this case the contention is now made that the determination of the Interstate Commerce Commission is binding no matter how arbitrary, capricious, or without substantial evidence to support it such determination may be made. The mere statement of the claim is its own refutation, for it cannot be under our American system, that in a criminal action in which the liberty and property of the citizen is in jeopardy, the status of the citizen, which is the only issue in the case, is determined, not by evidence produced against him at the trial, but by the determination of an administrative body, which in this case is the Interstate Commerce Commission, and there is nothing left, if that determination is final, but for the court to pronounce judgment against him.

To the contention of the petitioners that the determination of the Interstate Commerce Commission is binding upon the court in a criminal action, unless it is arbitrary, capricious, or not supported by substantial evidence, we answer:

First. As stated by the majority opinions in the Circuit Court of Appeals, by virtue of the proviso of Section 1, First, of the Railway Labor Act, the authority which is vested in the Commission is to determine whether any line operated by electric power falls within the terms of the proviso. In other words, the effect of the proviso

is to except or exclude from the term "carrier" any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but not to exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. "The inclusion," said Circuit Judge Williams, "of 'any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power' and the confining of the Interstate Commerce Commission to determine 'after hearing' as to whether 'any line operated by electric power falls within the terms of this proviso,' restricts the Commission to the determination whether the Utah Idaho Central Railroad Company, a street, interurban or suburban electric railway, was operated as a part of a general steam-railroad system of transportation." It was and is conceded that it was not, and therefore the Commission had no authority to determine that it was not an interurban electric railway.

Second. The Congress has not manifested its intention that the determination of the Interstate Commerce Commission shall be binding upon the courts, even if it was not arbitrary, or capricious, or if not supported by substantial evidence. No case is cited by petitioners which holds that in a criminal case the finding of any administrative body is binding upon the court, and, as heretofore pointed out, in the very nature of things, no such holding could be made, nor any case which holds that in a suit to restrain prosecutions under a criminal statute any finding of an administrative tribunal as to the status of the plaintiff is binding in any way upon the court. In their petition, petitioners cite three cases which they claim hold that the decision of the Interstate Commerce Commission is binding if supported by substantial evidence, and is neither arbitrary nor capricious. In each of the cases cited, however, the statute expressly provided the effect of the decision of the Interstate Commerce Commission in litigation based upon such decision, and limited the right of review by the courts.

The first case cited is that of *Interstate Commerce Commission vs. Union Pacific R. R. Co.* 222 U. S. 541. In that case the suit was brought under U. S. C. A. Title 49, Section 16 (12), which reads as follows:

> "*Proceedings to enforce orders other than for payment of money.* If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission, or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

It will be observed that the statute provided that if the order was "regularly made and duly served," it should be given effect.

The next case cited is that of *Virginian Ry. Co. vs. United States*, 272 U. S. 658, which was a suit brought under the same section and in which, of course, the order of the Commission made pursuant to the same statute was given the same effect.

Judge Bratton in his dissenting opinion in this case in the Circuit Court of Appeals is mistaken when he says that there has been any change in Section 16 of the original Interstate Commerce Act with respect to the enforcement of orders of the Commission. As to reparations cases, Section 16 of the statute in subparagraph (2), originally and ever since, has made the findings prima facie evidence of the facts therein stated (U. S. C. A. Title 49, 16 (2), and the same section of the statute,

subdivision (12) thereof, as shown above, originally and now makes it the duty of the court to enforce obedience to the orders of the Commission by a writ of injunction, if the order was "regularly made and served." Moreover, the statutes relate solely to orders made by the Commission in the exercise of its powers and not to findings made merely in aid of some other administrative body, as here the Mediation Board, which is not bound to follow such findings.

The only other case cited is that of *Swayne & Hoyt, Ltd. vs. United States,* 300 U. S. 297. That case arose under the Shipping Act, and the act (U. S. C. A. Title 46, Section 828) provides that if the court determines the order of the Board to have been "regularly made and duly issued," it shall enforce obedience thereto. Indeed, all the cases which hold that the decision of an administrative body is to be given any effect in a case before a court in which that decision is involved rest upon an express provision of the statute.

At the same time the Railway Labor Act was enacted, three different statutes, to be administered by separate agencies, were enacted, the Railway Labor Act to be administered by the National Mediation Board, the Railroad Retirement Act to be administered by the Railroad Retirement Board, and the Carriers Taxing Act to be administered by the Collector of Internal Revenue. Each contained precisely the same provisos excluding interurban railroads. The obvious reason for authorizing the Interstate Commerce Commission to determine whether an interurban railroad is a part of a general steam railroad system of transportation is that in the first instance these various agencies should not make different determinations with respect to the same railroad in that regard, which might well happen if each were to make the determination under the proviso itself, but it cannot be argued therefrom that there was any intention on the part of Congress to deprive the particular railroad of having its day in court to have its status passed upon by the courts in an appropriate case, else Congress would have said so. It

is significant, indeed, that the Congress did not even specifically say that the determination by the Interstate Commerce Commission would be binding on the three agencies operating under the three acts named, as it had specifically said in the Railway Mail Pay Act, which vested authority in the Commission to determine the rates of pay to railroads for carrying mail, and also provided that the Postmaster General should pay the rates of pay so determined (U. S. C. A., Title 39, 541-566, especially 551).

As pointed out by this court in the case of *Shannahan et al, Trustees, vs. United States,* not yet officially reported, but found in 82 L. ed. at page 740, speaking through Mr. Justice Brandeis, the determination by the Commission under Section 1, First, of the Railway Labor Act is not even a decision which the Mediation Board is empowered to enforce.

> "The Act confers upon the Board no power over any carrier. It merely imposes upon the Board possible duties in respect to interstate carriers by railroad not exempted by the proviso. * * * In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso."

So in this case the respondent, if subject to the act, must post the notice required to be posted, irrespective of any action by the Interstate Commerce Commission or by the Mediation Board, once the form of the notice and the time and place of posting thereof is specified by the Mediation Board. Its failure so to do makes it incumbent upon the District Attorney to prosecute, and the only question in the criminal prosecution, other than the question of failure to post the notices, would be whether the defendant is a carrier within the meaning of the act, and the determination of that matter by the Interstate Commerce Commission only for the purpose of aiding the Mediation Board to perform its duties, could not be in any wise binding.

Finally, under this head, in all the cases which have come before this court involving the question whether or not particular carriers were interurban railroads, this court has not hesitated to determine the question independently of any determination by the Interstate Commerce Commission.

Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission, 286 U. S. 299;

United States vs. Chicago, North Shore & Milwaukee R. Co. 288 U. S. 1.

And in the case of *United States vs. Idaho*, 298 U. S. 105, this court decided the analagous question of whether a particular line constituted a spur track, despite a prior determination thereon by the Interstate Commerce Commission.

It is claimed, however, by petitioners, that these cases are not applicable to the case at bar, for the reason that the provisions of the Interstate Commerce Act under which they arose did not specifically authorize the Commission to make the determination as to which carrier fell within their terms, and that is the only contention made as to the inapplicability of these cases to the matter in issue herein. Such contention is obviously based upon an erroneous interpretation of the provisions of the Act. The Piedmont case arose under the provisions of the Transportation Act, requiring that a certificate of convenience and necessity be obtained by a carrier subject to the provisions of the Act from the Interstate Commerce Commission, before embarking upon any extension of its lines. As heretofore pointed out, the Act specifically exempted from the provisions street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam-railroad system of transportation. The Piedmont & Northern Ry. Co. made application to the Commission for such a certificate, such application being made without prejudice to its making claim that it was exempt as an interurban. The Commission found the railway not an interurban, overruled the claim of exemption,

and denied the certificate upon the merits. Thereafter, the Piedmont commenced construction of the extensions and the Commission brought injunctive proceedings in the District Court, alleging that the construction was illegal, as no certificate had been obtained. The railway defended upon the ground that it was an interurban. The trial court overruled the defense and enjoined the construction, until a certificate had been obtained from the Commission. The railway appealed to the Circuit Court, but this court granted certiorari prior to the hearing by the Circuit Court.

The Act gave the Commission exclusive power to issue such certificates, but was silent with respect to its authority to determine what carriers were subject to the Act. It is obvious, however, that while the Act is silent as to that, it nevertheless granted such authority to the Commission as effectively as if the grant had been in express words.

The Act excluded certain types of interurbans (those operated as a part of a general steam-railroad system of transportation) from its operations. Under it, when the railway made application for a certificate, the Commission first had to determine if the railway came within the Act. Inasmuch as it was necessary to make this determination as preliminary to the determination as to whether to issue the certificate, the authority must be read into the statute as conclusively as though it was therein expressly stated.

The same is true of the case of United States vs. Idaho, supra, wherein the railroad applied for a certificate for the abandonment of a line of track. Under the Act, there could be abandonment of the line if it was a spur, so again it was necessary for the Commission to determine the preliminary question as to whether the line was a spur, before proceeding to hear the application for abandonment on the merits. As it was essential that this preliminary question be first disposed of, before the Commission could proceed to exercise the power expressly granted, the power to determine such preliminary matter must be read into the express grant to the Commission.

The case of the *United States vs. Chicago, North Shore & Milwaukee R. Co.*, 228 U. S. 1, arose under Section 20a of the Transportation Act, and required all carriers to obtain a permit from the Interstate Commerce Commission before issuing any securities, but specifically exempted interurban, street, or suburban railways, which are not operated as a part of a general steam-railroad system, from the requirement. Action was brought by the Commission to enjoin the railroad from issuing securities, without first having obtained from the Commission an order permitting it so to do. Here again, the authority of the Commission to determine whether the particular carrier was an interurban exempt from the Act was not expressly given, but again it was necessary for the Commission to pass upon that question before passing upon the application for a permit on the merits. So such authority was by the Act, by necessary implication, conferred upon the Commission, though not expressly so stated in the Act.

In each of these cases, therefore, the Commission had in fact the authority to determine whether any particular carrier was an interurban and exempt from the Act, or whether the particular line was a spur and exempt from its provisions, which authority was as effectively conferred as the authority of the Commission to make the determination as to whether a particular carrier is exempt as an interurban from the provisions of the Railway Labor Act. In each of these cases, that is, the Piedmont, the North Shore, and the Idaho, the courts, despite the fact that the Commission had the authority to find and did find with respect to whether the carrier was an interurban or whether the particular track was a spur, themselves decided and found de novo on the same questions. As the authority of the Commission to make those findings in the statutes under which those cases arose was equally as extensive as the authority of the Commission under the proviso of the Railway Labor Act, these cases must be taken as binding precedents for the proposition that the trial court in the case at bar did not err in determining de novo the respondent's status.

Third. The Interstate Commerce Commission over a long period of years has treated the respondent as an interurban railroad and recognized it as such in several different ways.

1st. Respondent was reorganized out of receivership and issued 20,000 shares of non-par common stock and two million dollars in first mortgage bonds in the year 1926, without the authority and approval of the Interstate Commerce Commission, as is required by Section 20a of the Interstate Commerce Commission Act if respondent is not an interurban electric railway. Under Section 20a such security issues are void (unless respondent is an interurban electric railway and thus exempted from the provisions of the section) and its officers and directors issuing the same are subject to penalties. Respondent believing itself to be an interurban electric railway and therefore not subject to the provisions of Section 20a, did not request approval of the Commission for the issuance of such securities.

The issue of these securities, however, was reported to the Interstate Commerce Commission on respondent's annual report form "G," and in the report, which was filed with the Commission on or about April 1, 1927, under the heading of "Explanatory Remarks," on attachment was made, explaining the set-up of the new company and its acquirement of the physical properties of the old company. Nearly a year later, the Director of Statistics asked for further information with regard to the sale of the property and the securities issued and such Director referred specifically to the pages of respondent's formal report, which is required from all common carriers generally subject to the Interstate Commerce Act.

There ensued over a period of more than two additional years correspondence between respondent's representatives and the Commission's representatives with regard to the method of accounting that respondent would be required to follow in showing on its books the reorganization of the company out of receivership and the issuance of the securities. In none of this correspondence,

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running over a period of three years or thereabouts, di
the Commission make a single objection to the fact tha
respondent did not request and receive authority for th
issuance of the securities under Section 20a.

With as much involved as there was, were respondent
not an interurban electric railway and therefore subjec
to Section 20a, it would seem almost unthinkable tha
the Commission, not having ever complained, could no
determine under another statute that respondent is no
an interurban electric railway. If such determination i
right at this time, then it would have been right at th
time this matter of security issues and reorganization ou
of receivership was before the Commission in th
correspondence mentioned.

2nd. During the entire period of its existence, re
spondent has continuously reported to the Commissio
its operations, not in the manner prescribed for railroad
of the type of ordinary steam railroads, but in the manne
prescribed for electric railways, and certainly it is anoma
ous now for the Commission to say that suddenly, witho
any change in its character, it is a railroad of the ordinar
steam type, and should have been reporting as suc
(R. 117-119).

3rd. As heretofore set out, respondent is now an
has been continuously receiving pay for the transportatio
of mail as an interurban railroad under the decision o
the Interstate Commerce Commission.

This administrative determination as to the status o
respondent as an interurban railroad brings it squarel
within the purview of the language used by this court i
the case of *United States vs. Chicago, North Shore &
Milwaukee R. R. Co.*, 288 U. S. 1, in regard to almo
this same set of facts that were adduced in evidence i
this case. This court in that case said this:

> "The required annual reports filed by th
> appellee (the Chicago, North Shore & Milwauk
> Railroad) with the Commission have shown
> securities issued since March 1, 1920 . . .

With this knowledge of the situation, the Commission never, until it requested the Attorney General to institute the present suit, by word or act, intimated that the procedure followed by the Railroad was illegal. * * * It would be difficult, indeed, to conceive a clearer case of uniform administrative construction of Section 20a as applied to this company. * * * The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has, for more than a decade, resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

The Petitioners claim that it was held by the Interstate Commerce Commission in *Rules for Testing Other Than Steam Power Locomotives,* 122 I. C. C. 414, that the respondent was not an interurban railroad, and that that hearing was a formal hearing. In the first place, the Locomotive Inspection Act, as amended, did not contain precisely the same exemption provision as in the Railway Labor Act, but omitted the word "steam." In that regard, the Commission said (122 I. C. C. at page 422):

"Under the bill first introduced, H. R. 5836, certain equipment was excepted although used on a street, suburban, or interurban railway, unless such railway was operated as a part of a 'general steam railroad' system of transportation. But the expression was changed and the word 'steam' eliminated. Evidently Congress intended to include street, suburban, and interurban electric railways if operated as a part of any general railroad system of transportation, otherwise the word 'steam' would not have been eliminated from the expression."

In other words, the Commission thus seized upon the omission of the word 'steam' to extend its jurisdiction over interurbans. And in the second place, the Locomotive Inspection Case was not a formal hearing. That case was determined on answers to questionnaires sent to the carriers, which related solely to the revenues from freight and passenger traffic.

In the third place, the Locomotive Inspection Act was a safety measure and as such to be liberally construed, and respondent had no desire to question such a safety measure being applied to it, even though not strictly within it, and has always complied with it.

Fourth. The determination by the Interstate Commerce Commission that the respondent is not an interurban railroad, even if it had the power to determine that question, is against the uncontradicted testimony introduced before the Commission, and is therefore against law. It is contended by petitioners that the District Court did not make any finding with respect to this matter, and Justice Bratton in his dissenting opinion in the Circuit Court of Appeals so states (R. 336). However, the trial court made the following findings:

> "That the only evidence introduced at said hearing (i. e. before the Interstate Commerce Commission) was the evidence introduced in behalf of The Utah Idaho Central Railroad Company, and that no evidence was introduced by any of the other parties thereto in conflict therewith. * * * That said uncontradicted evidence of the plaintiff introduced at said hearing shows and the court finds upon the said evidence, and the transcript of the record of said hearing as introduced in this cause, which is the entire record of evidence before said Commission at said hearing, that plaintiff is a railway operated by electric power and is known as, and in fact is now, and ever since its construction has been, an interurban electric railway as such term is used in and within the purview of said Railway Labor Act. * * * And that the

> determination of said Commission that the plaintiff does not constitute a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1924, is against and contrary to law."

In other words, that the finding of the Commission, being against the uncontradicted evidence introduced at the hearing before it, is contrary to law.

Whether that finding is justified depends upon an analysis of the evidence introduced before the Commission. It is conceded that the evidence introduced at the hearing before the Commission and that introduced at the trial is substantially the same. That evidence is a follows:

The location of the line of the respondent is shown by the map which was introduced as Exhibit 1 (R. 157). It runs from Ogden City in Weber County through a portion of Weber, Box Elder and Cache Counties, over the state line into Preston, Franklin County, Idaho, its length being approximately 95 miles. It has two branches, one extending west and south from Lewiston, Utah, to Quinny and Thain, a distance of approximately twelve miles, and the other from Harrisville, in Weber County, Utah, to Plain City and Warren, a distance of approximately eight miles. The line extends from the middle of the block between Grant and Lincoln Avenues and Twenty-third and Twenty-fourth Streets—the block in which the Postoffice building is located in Ogden, which is the second largest city in Utah, along Lincoln Avenue, which is one of the principal streets of the city, to the next town, which is Willard, where it also occupies a public street for a distance of approximately one mile, thence to the next city, which is Brigham City, where it again runs along a public street for a distance of approximately four miles, thence to Honeyville, a small town, where it is on one of the two streets of that town. It thus serves the northern portion of the Salt Lake Valley. After leaving that town, the line extends over what is known as the Collinston divide into Cache Valley, which

the divide separates from the Salt Lake Valley, and enters Mendon, traverses there a public street throughout the city limits, thence to the next town, which is Wellsville, enters that town on a public street, makes a sharp right angle turn thereon, and then proceeds along the main street of the town for the entire length of that street. The next town is Hyrum, where the line occupies a public street for the entire length of its line therein. Thence it proceeds to Millville where it again occupies a public street between the town's limits. The same is true of the next town, Providence. Logan, the fourth largest city in Utah, is the next town reached and there the line occupies the main paved business street and its residential extension between the city limits. The same is true of the next city, Smithfield. Thence it proceeds to the next city, Richmond, where it occupies a public street for its entire length, this street being two blocks from the main street. Lewiston, the next town, is the only city or town on the line which is entered by a private right of way, although even there the track occupies a public street for a short distance. The line then enters Idaho, only because the Cache Valley extends beyond the state limits, and proceeds in Idaho a distance of about six miles to its northern terminus, the city of Preston, where it occupies the main paved street to the end of the line. (R. 79-80.)

In all of the cities, the respondent in its operation is subject to speed limit regulations of from twelve to fifteen miles per hour, in Logan along the main paved street being twelve, and it is likewise subject to the stop-and-go signals there, and in Smithfield the same as other vehicles using the streets. (R. 80-81.)

The respondent also operates a bus line from Ogden to Preston, parallelling the rail line upon which the freight and passenger trains move, except that instead of going over the Collinston divide it proceeds on the main highway eastward from Brigham City through the Sardine canyon, to the Cache Valley. (R. 81.)

The respondent also operates a local urban bus line in Logan City, which, in addition to serving the residents of the city, transports students to and from the State Agricultural College, which is located there, as well as its supplies.

Respondent's line substantially parallels the Oregon Short Line Railroad to the Collinston divide, except that the Short Line does not occupy any city or town streets, but that railroad thence proceeds northward to Cache Junction, from which a branch line parallels the respondent's line through the Cache Valley to Preston. The Oregon Short Line formerly entered Cache Valley over the Collinston divide, as does the respondent's line now, but that line was abandoned by the Short Line because it was not adaptable to steam line operation because of the heavy grades and sharp curvatures. (R. 82.)

In all the cities and towns through which the line passes, the respondent of course had to obtain franchises, as well as from the counties in which highways are occupied. All of these franchises require it to use a motive power other than steam, and some only authorize it to operate as a "street and interurban," or "interurban or street railway." (R. 158.)

18.2 per cent of respondent's line is on public highways or city or town streets, but within the limits of towns and cities, excepting Lewiston, almost one hundred per cent is on city or town streets and, with the exception noted, it is only outside these towns and cities that a private right of way is used. In other words, a private right of way is used only to reach cities and towns, so as to prevent the line being as little circuitous as practicable, but once they are reached, then the public streets are used, but, no matter how circuitous the route, the line was so constructed as to reach every city and town in the valley.

The respondent has interchanges with the Bamberger Electric line at Ogden, with the Denver and Rio Grande Western Railroad at Ogden, and with the Oregon Short

Line Railroad at several points, (R. 49), and has joint tariffs with substantially all the railroads of the country. (R. 141.)

The history of the development of respondent's line is typical of practically all interurbans, namely, the extension of street car systems and the connecting of small interurbans. The evidence discloses that history of the building of the line to be as follows. (R. 158-161):

> "The present Utah Idaho Central Railroad Company is the result of the combination and extension of several small street car and interurban properties.
>
> It had its inception in Ogden, Utah, about 1890, from a street car system, approximately three or four miles long, upon which were operated some horse drawn cars. This company eventually became insolvent and when liquidated its assets were purchased by a group of Northern Utah citizens, headed by the late David Eccles, who organized a corporation under the laws of Utah, which was known as the Ogden Rapid Transit Company. This change took place in the late nineties and thereafter marked the beginning of the rehabilitation, electrification and further expansion of the properties which are known today as the Utah Rapid Transit Company, located within the corporate limits of Ogden City, and The Utah Idaho Central Railroad Company, the interurban line in question.
>
> Sometime in the late nineties, a corporation was formed under the name of the Ogden and Northwestern Railroad Company, which built a small interurban line of railroad from the north city limits of Ogden along the country roads to Hot Springs in Box Elder County, and operated thereon for passenger and some freight business, their initial power being furnished by a small steam locomotive.

The rails of this new company connected at the north city limits of Ogden with the rails of the Ogden Rapid Transit Company on Washington Avenue, the two companies jointly handling interurban traffic.

Subsequently the same interests who owned or held control of the Ogden Rapid Transit Company acquired the ownership of the Ogden and Northwestern Railroad Company and from that time on operated common equipment over both properties.

Approximately in the year 1910, the Ogden Rapid Transit Company as a corporation acquired the property of the Ogden and Northwestern Railroad Company and equipped the latter company for an electric interurban operation and also extended the line along the public highway from Ogden Hot Springs to Brigham City, Utah, which is located twenty-one miles north of Ogden, operating electrically over the entire line for the transportation of passengers and freight.

Contemporaneously with this development between Ogden and Brigham City, practically the same people who owned the Ogden Rapid Transit Company built a line of street and interurban railway in the City of Logan, Cache County, extending same northward through Hyde Park to Smithfield, Utah, a distance of about eight miles, and south through Providence, Millville and Hyrum to Wellsville, Utah, a distance of approximately twelve miles, operating over this interurban by means of electrical power and handling passenger and freight business, the freight business being largely agricultural products produced in the vicinity of their line of railroad.

About the month of May, 1914, the Ogden Rapid Transit Company operating in Ogden City and from Ogden, Utah, to Brigham, Utah, and

the Logan Rapid Transit Company, operating in Logan City and between Wellsville, Utah, and Smithfield, Utah, were consolidated into a single corporation under the laws of the State of Utah, known as the Ogden Logan and Idaho Railway Company.

This corporation for a time thereafter operated all of the properties formerly owned and controlled by the Ogden Rapid Transit Company and the Logan Rapid Transit Company, and also commencing about the time of the consolidation rebuilt a portion of the line extending from Ogden northward through Brigham City and constructed a new line from Brigham City north over the Collinston divide into Cache Valley connecting with the southern terminus of the Logan Rapid Transit Company; also extending the northern terminus from Smithfield, Utah, to Lewiston, Utah, a distance of eleven miles, and eventually crossing the state line to Preston, Idaho, which lies approximately six miles north of the Utah state line.

The Ogden Logan and Idaho Railway Company continued thereafter to operate the street car system in the City of Ogden, the street car system in the City of Logan, and also the interurban line which had been developed out of the interurban properties of the Ogden Rapid Transit Company and the Logan Rapid Transit Company, continuing to carry on the same general character of business of transporting both passengers and freight with electric cars.

In the latter part of 1919, it seemed desirable to segregate the interurban operations of the company from the purely local street car operations in the City of Ogden and the suburban operations extending east from Ogden City into Ogden Canyon. Accordingly a new corporation was formed known as the Utah Rapid Transit Company, which took over and operated the local street car system in

Ogden, Utah, and the suburban line running east from Ogden into Ogden Canyon, the ownership and operation of the interurban railroad from Ogden, Utah, to Preston, Idaho, remaining with the Ogden Logan and Idaho Railway Company, which had changed its name to Utah Idaho Central Railroad Company.

Utah Idaho Central Railroad Company, a Utah corporation, continued to operate these interurban lines until the latter part of the year 1926, when a corporate reorganization took place and the properties were then continued under the ownership and operation of The Utah Idaho Central Railroad Company, a Delaware corporation, which is the present owner and operating company.

Throughout all of these developments of this interurban property through the various companies previously named, the personnel of its employes and owners has to a very large extent remained that of the original street car and interurban companies, namely, the Ogden Rapid Transit Company and the Logan Rapid Transit Company."

The purpose and method of operation of the line was then shown in a general way, followed by evidence in detail as to its various phases. (R. 161-164):

"As indicated in the history of the corporate development of The Utah Idaho Central Railroad Company, the property as it now exists was practically completed in the latter part of the year 1915 and represents as previously explained the joining together of individual small interurban railroads previously constructed in Cache Valley and in Weber and Box Elder Counties.

These roads were practically entirely financed by local citizens in the Northern Utah area who were collectively interested in the various agricultural and agricultural manufacturing pursuits which

are common to this section, such as dairying and milk processing; sugar beet raising and sugar manufacturing; canning; livestock; poultry; fruits; vegetables, etc.

These people were naturally also interested in the economic, cultural and educational development of the various small communities which are now contiguous to the interurban railroad. Their idea in the construction of the constituent properties and in the later joining together of these properties into one line was to furnish an easy convenient method of intercourse between those communities and also to furnish a method of transporting the raw products grown in the area to the agricultural processing and manufacturing plants which they developed within the area.

This requirement could be best and most satisfactorily served by the construction of an interurban electric line with its consequent frequent and rapid passenger service and its natural ability, by reason of its type, to provide a convenient and economical method of moving raw products at frequent intervals, and over short distances to the processing plants.

This type of service was and is distinctly within the physical scope of an interurban railroad in that, as will be later shown, its entire physical construction was designed to accommodate small trains, rapidly moving, at frequent intervals, and it is a character of service not possible of being furnished by the ordinary steam railroad, in that a major requirement of steam railroad operation is long trains and a service largely influenced as to schedule by the availibility of sufficient tonnage to approximate the rating of the power used. The continual development in steam transportation of larger power with its consequent longer trains and longer intervals between those trains creates a

physical condition which cannot be adapted to the type of service performed by an interurban railroad.

To illustrate this point, such services as the following have been performed by The Utah Idaho Central Railroad Company. The handling of raw milk from concentration points to condenseries. This service must be performed with a minimum of time enroute and a definite arriving time at the condensery to fit in with their daily evaporation program. This movement is generally accomplished with the power unit and one car and usually entails special service.

This company has also performed a service of moving shelled peas, from vineries to canning factories. In the canning of peas, it is necessary in order to preserve their natural flavor that a minimum amount of time be consumed from the field to the cannery, peas being harvested in the fields, taken to the vinery for shelling, and moving in lug boxes rapidly into the cannery before either time or temperature can start the change in flavor. This movement likewise is accomplished with one or two car trains and special service.

Another typical interurban movement is the handling of ripe tomatoes in stock cars for movement into the canning factory, usually with special service.

Large quantities of beets are handled from various loading stations in small trains to the sugar factories for processing.

These are only typical of the type of service performed and generally represent the transportation link of the industrial development contemplated as a unit by the same people who constructed the processing plants at the same time they constructed this interurban railroad.

The number of trains operated daily on this property, which will be later herein shown, in itself

presents a more concrete picture of the frequency of service actually used in the operation of the property.

Likewise, there will be shown, the large number of sidings and spurs available for the loading of raw products and also there will be shown the frequency of available passenger stops for the convenience of short distance interurban travel.

The company at the present time in addition to the operation of numerous small freight trains operates both one and two car interurban passenger trains and gasoline motor busses.

A distinctive feature in the interurban passenger operation, which tends to illustrate the type of service furnished the communities involved, is the transportation of school children. The providing of educational facilities in this section is through the location of high schools at central points rather than in each community and, in the carrying out of this policy, at public expense students are brought from their homes to these centrally located schools.

For many years pick-up and delivery service has been rendered at all available points in connection with package freight. A daily package merchandise train is operated making a round trip from Preston, Idaho, and return during the night hours.

This train is powered by an interurban electric car constructed so as to make a large portion of the car available for the handling of package freight, each car also being equipped with refrigeration facilities for the handling of perishable commodities in summer weather and with heating facilities for their handling during the winter weather. The locomotive unit on this train is likewise sufficiently powered to permit the hauling of other cars of package freight."

It is significant that there was in existence at the time of the construction of this line a steam railroad, which the respondent's line closely parallelled (R. 28). The conclusion is irresistible that the service rendered by the ordinary steam railroad served, and the reason it did not meet those needs was two-fold. It was not designed to and did not provide rapidly moving trains, stopping at frequent intervals for the transportation of the public especially the school children, as above stated, and as will later be more fully shown. It did not furnish the facilities for the gathering of the products of the soil of this purely agricultural territory and the transportation to the steam railroads of those products which could reach the outside markets without processing, and what is far more important, because it involves the greater part of the agricultural products of the territory, their gathering and transportation to the processing plants, which, as pointed out, were thereupon located on respondent's line, and after being processed are transported by respondent to steam lines to be carried to the outside markets. If the then-existing steam railroad had met these needs, then respondent's line would never have been built. It was to meet them it was built, and continuously since then has been operated to meet those needs.

Evidence was introduced to show the various phases of the physical construction of the respondent's line and to demonstrate that they are so co-ordinated one with the other as to prevent it rendering the type of transportation service which is rendered by the ordinary steam railroad, without a complete transformation and relocation of the line in all its details, but on the contrary to compel the rendering of a type of transportation service distinct and separate from any other agency of transportation, whether that of an ordinary steam railroad, a truck line, a bus line, or an airplane line, and the limitations of its physical construction impel what has been commonly understood to be the transportation service of an interurban railroad.

This evidence as to the physical characteristics of the railroad was introduced in the form of Exhibits, which are set out in full in the record, and will only briefly be referred to herein for the purpose of showing that the foregoing conclusions are completely sustained by the record.

First, the motive power. The evidence as to that shows that the electric locomotives owned by respondent have a minimum practical rating, in other words, the tonnage the locomotive will pull, of 275 tons, and a maximum of 650 tons on two small sections of the line, with an average of 550 tons, so that the number of loaded freight cars (each of which has a gross weight of 45 tons) which a locomotive will pull between Ogden and Brigham City is twelve cars, and less on other parts of the line (R. 85; Exhibit 5, R. 164).

Second, the equipment. The evidence with respect to that shows that the respondent owns 173 freight cars, 75 of which are of such construction that they cannot be interchanged with the steam railroads. The remaining 98 are dump cars, known as gondolas, which were purchased by the respondent for the transportation of sugar beets from the dumps established on respondent's line in the various localities in which they are raised to the sugar factories. They are so used during the beet season, and during the remainder of the year they are used for the hauling of coal from the mines to the industries located on respondent's lines, and are only interchanged when lime which originates on respondent's line is shipped to sugar factories off respondent's line, that being the only commodity, other than sugar beets, originating on the line for which such cars are suitable. (R. 85-86; R. 141-142. Exhibit 6, R. 165.)

Third, the substation equipment. The evidence with respect to that shows that the electric power, with which the respondent's line is operated, is purchased by respondent from the Utah Power & Light Company and delivered by that company to the substations of the company at high voltage, transformed through the company's general

ects to 1500 volts. These substations are located at
en, Hot Springs, Dewey and Smithfield and the
ipment of substations is of such a size that it will
nish sufficient power only for the locomotives owned
the company, that is, those capable of hauling twelve
s, and if heavier trains were to be hauled, then they
uld have to be rebuilt to accommodate locomotives with
eater practical rating (R. 85-86; Exhibit 7, R. 166).

Fourth, the Electrical Positive Feeder and Trolley
rcuit and Negative Rail Circuit. The evidence as to
at shows that they are limited as to the quantity they
n carry, taking into consideration line losses, so that
ey are only sufficient to operate the locomotives with
he practical rating capacity of the locomotives owned,
o that if locomotives of a greater capacity were to be
sed, the circuits, would have to be replaced (R. 86-88;
Exhibit 8, R. 166-167), else the locomotives would be stalled
for lack of power.

Fifth, character of track construction. The evidence
as to that shows that the track is constructed of light
rails, the heaviest, except for a distance of two miles in
the paved street in Smithfield, being 70 pounds, as contra-
distinguished from an average of 100 pounds on steam
lines. The ties on which the rails rest are 6-8 inches,
as contradistinguished from steam line rail construction,
in which the ties used are not less than 7 by 9 inches, and
generally 10 inches. The respondent uses a tie six feet
in length, whereas the steam roads use a seven foot length,
the different tie and rail construction being required by
the heavier loads imposed upon them. Only eleven miles
are tie plated, a tie plate being a square piece of metal
between the rail and the tie, in order to form a wider
base for the rail to rest on, and thus relieve the stress,
whereas all the main steam lines and practically all their
branches are tie plated (R. 89; Exhibit 9, R. 168).

Sixth, car capacity of spur and passing tracks. The
evidence as to them shows that the average length of the
respondent's passing tracks will accommodate 16 cars,
whereas the average length of the passing tracks on the

steam roads is from 75 to 150. It also shows that there are 34 spurs or passing tracks on respondent's main line, and eleven on the branch lines, averaging approximately three miles apart on the main line and two miles apart on branch lines. (R. 90; Exhibit 10, R. 169.)

Seventh, the curvature of the turnouts to the yard facilities and industries on the line. The evidence as to them shows that the curvatures on the turnouts are so restricted that neither ordinary steam locomotives nor steam passenger cars can be operated over them, and over some of them the larger freight cars can only be taken when they are taken one at a time. (R. 90; Exhibit 11, shows in detail the curvatures on the main line and sidings, and the turnouts, sidings and spurs. R. 171-195). Respondent's equipment is so designed that it can be operated on such a track. For instance its locomotives are only 35 feet long with a 16 foot distance from truck center to truck center (R. 90).

Eighth, the grades. The evidence as to them shows that there are on the main line of the respondent's line 75 or 80 grade breaks, that is points at which the percentage of grade, or the up hill or the down hill changes; in other words, that the line follows the contour of the country ordinarily, with no attempt to change the grades by cuts and fills, with the result that there are on the line what would be considered excessive grades for a steam line. The maximum is 4.77. It is indeed significant in this respect that as already pointed out, the line is built over the Collinston divide, formerly used by the Oregon Short Line, and which was abandoned by that railroad and its road reconstructed to avoid the grades and curvatures over that hill (R. 82).

By means of a profile map of respondent's road as it is constructed in ten mile areas, with the factory rating and practical rating of the locomotives imposed thereon, there is shown the combined effect of the road's physical construction and facilities upon the operation of its trains. As an example, the first sheet of Exhibit 14 shows the first ten miles from Ogden, with 13 grade breaks in

section. Over it the respondent can haul a train of
re loaded cars northbound and fourteen cars south-
d. The second sheet shows that over the next ten
sector only twelve loaded cars can be hauled. However,
s have to be spaced so that two trains are not pulling
he power in a particular sector at the same time.
n with the other sectors, except those shown on sheets
d 6 over the Collinston divide. Going north or south,
ain of only eight loaded cars can be operated, but the
ance for which that limitation exists is a little greater
g north, which is approximately eight miles, than south,
ch is six miles.

This situation limits the entire operation, so that if
ain leaves Ogden with twelve cars and four of them
pot out of the train when it reaches Dewey by reason
eing destined to intervening points, it is necessary to
de the train to enable it to go over the divide. The
e is true of southbound trains. (R. 93-94; Exhibit 14,
00-210).

Thus it is shown by the evidence that not many,
admitted by counsel for petitioners in their petition
page 6, but all of the physical characteristics of
pondent's railroad are those of an interurban railroad.
reover, that they are all correlated and tied together,
s to make necessary a particular type of transportation,
ch is interurban in character, that is, short, light trains
rated at high speed, at frequent intervals, and making
quent stops along the line, both in the carriage of pas-
gers and freight. In other words, that such a type of
ration is not made necessary by only one of those
sical characteristics, but by all of them operating
formly as limiting factors, so that a change in one of
n would not make possible a change in operation, but
would have to be changed, and substantially to the
e extent; that the limitations of motive power, electric
er at the substations and through the wires, the
racter of equipment, the length of sidings, the construc-
of the track as to rails, ties, etc., its grades, the curva-
es thereof and of the turnouts, and the operation upon

the public highways and city streets all impose upon the respondent the same limitation of operation as above outlined. If the respondent desired to increase its tonnage, it would have to operate additional trains, not longer trains (R. 88). On the contrary, the type of operation of the ordinary steam railroad is entirely different. Upon them the track construction is of heavy rails, of large ties, tie plated, capable of standing heavy loads, with motive power capable of hauling heavy tonnage, with grades and curvatures held to a minimum, permitting the operation of long and heavy trains moving at intervals fixed by the necessity of obtaining sufficient tonnage to warrant the use of the motive power, and making infrequent stops (R. 88).

The evidence, in a series of statistical exhibits, shows that, as compelled by its physical characteristics, the actual operation of the railroad is in fact of the interurban type.

Exhibit 15 shows from the years 1932 to 1935 inclusive, by months, the number of passenger trains, passenger busses and freight trains operated over the line and the average daily number. In brief, it shows that during the year 1932 there was an average of 9.7 passenger trains per day, 4.1 passenger busses and 6.6 freight trains. In the year 1933, the average number of passenger trains was 11, passenger busses 5.6, freight trains 7.7. In 1934, the average was 11.5 passenger trains, 4.1 busses and 7.7 freight trains. In the year 1935, the average was 9.6 passenger trains, 4.2 busses and 7.8 freight trains. (R. 96. Exhibit 15, R. 209-210.)

Passenger trains are operated on a regular daily schedule (Exhibit 42, R. 243). Freight trains are operated as special (or "extra") trains on orders as needed to accommodate the traffic (R. 96).

The respondent operates a daily merchandise train for the handling of less than carload freight, which is powered by a passenger car with the windows boarded up and the passenger carrying space used for the handling

package freight. Perishables in the summer time are handled on this train in a specially constructed refrigerator car, and in the winter the car is heated to protect shipments affected by extreme cold. A pick-up and delivery service is rendered as to all shipments in less than carload lots. The daily merchandise train is operated so that the shipper in Ogden, or in Salt Lake City, (the train being operated in connection with the Bamberger Electric Railroad, an interurban operating between Salt Lake and Ogden) can every working day in the year have the railroad's truck call at his place of business at any time before closing time for any merchandise he desires to ship on respondent's line and the same will be delivered to the consignee at any point on the line at the opening of business the following morning. A similar reverse service is given by these railroads southward. The freight that is thus moved consists of all types of merchandise shipped by wholesalers in Salt Lake and Ogden to consignees on respondent's line. Southward from the farms and processing plants, the agricultural products are shipped to the markets in Salt Lake and Ogden. (R. 96-97.)

Exhibit 16 is a list of the passenger stations on respondent's line, showing the distances between stations, whether they are agency stations or not, the populations of the cities or towns where stops are made, except that where no population is shown it is a country road stop. In brief, in the 107 miles of main line and the Plain City branch, there are 73 passenger stops, or approximately one stop every mile and a half, practically at every cross road. In every city or town there is an agency station and outside them the passenger walks down the country road to the stopping place and flags the train. In many of them the respondent has built a shelter as a protection against wind and rain. In the cities and towns (other than the station at Ogden), the train stops in the middle of the street, and the passenger walks out and boards the train as he would a street car. In fact, the passenger service rendered by the respondent, as is the case generally with interurbans, is but an extension of a street car system to the country. The stops are somewhat wider

spaced, because there is not the density of population there is in cities. The stops are made at the cross roads, because they are the concentration points of the areas of population. (R. 97-99. Exhibit 16, R. 211-213.)

Exhibit 17 shows for the five year period 1931 to 1935, inclusive, the number of passengers handled, the amount of passenger revenue, and the average fare per passenger. In the year 1931, the line handled 489,000 passengers, at an average fare of 18.3 cents. In 1932, 407,000 passengers, at an average fare of 16.5 cents. In 1933, 366,000 passengers, at an average fare of 16.8 cents; in 1934, 408,000 passengers, at an average fare of 15 cents, and in 1935, 400,000 passengers, at an average fare of 16.1 cents. This demonstrates that the service rendered is but an extended street car service; in other words, the closely spaced passenger stops are being used to travel from one community to another, or to and from the larger communities to work, which is a characteristic interurban service. (R. 99, 100; Exhibit 17, R. 213-214.)

Exhibit 18 classifies the passengers handled during the same five year period between regular passengers and school children. The school children in Cache Valley are transported at public expense to centrally located schools. For example, there are only two county high schools in the county, both of which have been located on respondent's line, and the students are picked up at the various stops on respondent's line and transported to and from these schools on special trains operated for that purpose at extremely low fares. The Exhibit shows that in 1935, out of a total of 400,000 passengers carried, 185,000, or a little less than half, were school children carried on special school trains and there was substantially the same percentage in the other years. (R. 100; Exhibit 18, R. 214.)

The foregoing exhibits prove that the actual operation of the respondent's line is, as not only would be expected, but made necessary by its physical makeup, not the operation of an ordinary steam railroad, but also prove that notwithstanding the limitations imposed by its type

construction, which would prevent it rendering the type service rendered by an ordinary steam railroad, nevertheless they suffice to permit respondent to render the public that type of interurban service which meets the needs of the public it serves.

By a comparison made with all the steam railroads operating into Utah, the evidence further emphasizes the difference between their physical construction and operation and that of the respondent. Thus Exhibit 19 shows the list of sidings for a distance of 200 miles from Ogden on the Los Angeles and Salt Lake Railroad, the Southern Pacific Railroad, the Oregon Short Line Railroad, the Union Pacific Railroad, and the Denver and Rio Grande Western Railroad. It will be recalled that an exhibit of this character introduced for the Utah Idaho Central showed the average length of sidings for the accommodation of trains to be 16 cars. Exhibit No. 19 shows for the Los Angeles Railroad that the average length of all its sidings in this 200 mile stretch is 87 cars, or between five and six times the length of respondent's. For the Southern Pacific, the average length is 114 cars, or between seven and eight times the length of respondent's. For the Oregon Short Line, the average length is 86 cars, or between five and six times the length of respondent's. For the Union Pacific, the average length is 109 cars, or about seven times the length of respondent's. For the Denver and Rio Grande, the average length is 86 cars, or between five and six times the length of respondent's.

The increased length of sidings on steam road tracks is to accommodate long steam road trains. For the same reason, the restricted length of respondent's is to accommodate short interurban trains. The number of sidings on the first two hundred miles of the Los Angeles Railroad is 35. The same is true of other steam roads. On the 95 miles of respondent's line, there are practically that number, in half the mileage.

The comparison of passenger stops would be much more out of line. Passenger stops on respondent's line average about every mile and a half; on the average steam

railroad, they will not average one in twenty miles. In this western country, there are distances as high as forty or fifty miles between steam railroad passenger stops. (R. 101; Exhibit 19, R. 215.)

Exhibit 20 makes a comparison between the operating results upon the steam lines coming into Utah and the results on respondent's line, with the consequent operating costs per mile, that is, the cost of labor for each car mile moved. It shows that in 1935 the average length of passenger trains on the Union Pacific was 10.7 cars, with an average cost for trainmen's service of 2.86 cents per car mile; on the Oregon Short Line, the average length of such trains was 8.6 cars and average cost 3.75 cents per car mile; on the Los Angeles and Salt Lake, the average length of such trains was 10.7 cars and average cost 3.22 cents per car mile; on the Southern Pacific, the average length of such trains was 10.3 cars and the average cost 3.52 cents per car mile; on the Denver & Rio Grande, the average length of such trains was 7.2 cars and the average cost 3.89 cents per car mile. On the respondent's lines, the average length of passenger trains was 1.1 cars and the average cost 4.9 cents per car mile; in other words, taking the Union Pacific as an example, the trains on respondent's line are one-tenth as long and the trainmen's cost per mile almost double. The comparison in other years shows similar results. (R. 103; Exhibit 20, R. 216-222.)

It shows that for the year 1935, the average length of a freight train on the Union Pacific was 60 cars; the average cost for trainmen's service was .65 of a cent per car mile. On the Oregon Short Line, the average length of such trains was 48 cars, its cost 1.01 cents per car mile. For the Los Angeles and Salt Lake, the average length of such trains was 48.3 cars, average cost 1.21 cents per car mile. For the Southern Pacific, the average length of such trains was 56.6 cars, average cost 1.08 cents per car mile. For the Denver & Rio Grande, the average length of such trains was 42.4 cars, average cost 1.28 cents per car mile. For the respondent, the

average freight train length was only 6.5 cars, average cost 2.5 cents per car mile. As compared with the Union Pacific, respondent's train length is approximately one-tenth, and respondent's labor cost for transporting each car one mile was about four times greater. (R. 102; Exhibit 20, R. 216-222.)

An even more pertinent comparison is made in Exhibit 21 between the operating results on respondent's line and on a steam railroad which operates a portion of its line by power other than steam. This is undoubtedly the type of railroad the Congress had in mind when in Section 1, First, of the Railway Labor Act it provided that "any part of the general steam railroad system of transportation now or hereafter operated by any other motive power," should not be excluded from the Act. Such a railroad is the Chicago, Milwaukee and St. Paul Railroad, a western railroad, a considerable portion of which has been electrified, namely, four or five hundred miles through Montana and east and west thereof. That road where electrified uses very large electric locomotives, with self generating features, about ten times as large as those used on respondent's line, with very heavy transmission lines, and so in Exhibit 21 the comparison is made between respondent's line and that railroad. It shows that the average length of passenger train on that portion of the railroad operated by steam was six cars with an operating cost per car mile of 4.82 cents, whereas on the portion electrified it was 10.1 cars and the cost per car mile 3.08 cents. The average length of freight trains on the steam portion was 45.8 cars and the cost per car mile was 1.16 cents, whereas on the electrified portion the average length of trains was 72.6 cars and the cost per car mile 3.08 cents. This clearly shows that where there can be an electrical operation under the same conditions as a steam operation, the railroad is capable of hauling as heavy or heavier trains, and it is even more efficient and less costly.

The situation, however, is entirely different, where, as on respondent's line or the ordinary interurban railroad,

the size of trains is limited by its physical characteristics, with consequent greatly increased cost of operation. (R. 103-104; Exhibit 21, R. 222-223.)

The facts brought out in Exhibits 20 and 21, and the differences between the operations of freight and passenger trains on steam lines and lines in part electrified, and the operation of trains on respondent's line, are more pointedly shown by the graphs, which constitute Exhibits 22, 23, 24 and 25. (R. 224-227.)

The Exhibits and the testimony respecting them bring out forcibly the difference in labor conditions on respondent's line and on steam railroads. Because of the long trains operated on steam railroads, a larger crew is required, and a different type of ability and experience, also the dangers are greater, and because steam trains are operated long distances the crews are required to be separated from their homes for long periods. On steam railroads, the crew consists of five men on passenger trains and six on freight trains, whereas on respondent's line on passenger trains a maximum of only two is required, and on freight trains a maximum of four is required, and on trains operated by a power unit and one car only two men are required. (R. 102.) The pay by reason of the foregoing differences is less on respondent's lines than on steam lines. (R. 106.)

The difference is also illustrated by the fact that since 1909 the employes of respondent have been unionized, but they did not belong to any of the steam railroad unions, commonly called the Big Brotherhoods, but were members of the Amalgamated Association of Street and Electric Employes of America, an affiliate of the American Federation of Labor, and continuously since 1909 up to June 1, 1936, by written agreements from time to time renewed between the respondent and that union, the rates of pay and conditions of labor have been fixed. Never during that entire period has there been a strike or a threat of a strike, and the amicable relations between the respondent and its employes were not disturbed until after the passage of the Railway Labor Act, when an

mpt was made by the Brotherhood of Railway Train- (one of the Big Brotherhoods) to organize the loyes into that union, for the purpose of imposing n the respondent the rates of pay and conditions of loyment prevailing on steam railroads, and to that forcing the respondent to comply with the Railway or Act. (R. 106-109, 110; Exhibits 27, 27-1, 27-2 and , R. 230-231.)

It is shown that not only is there a difference in rates pay on respondent's line, but in method of pay. On m railroads, the employes are paid on a basis of an ht-hour day, whereas on respondent's line they are d on a hour basis. The effect of this difference is wn by an illustration (R. 132):

A train man is called in Preston, Idaho, respondent's thern terminus, to bring a passenger train to Ogden, ah. That would consume three hours' actual running e. If the steam railroad method were used respondent uld be required to pay him for an eight hour day. ter he arrives in Ogden, and it is assumed respondent ds it necessary to send him to Plain City, a point about or twelve miles above Ogden, for a car of potatoes, ich would consume 45 minutes, the respondent would required to pay him the eight-hour day minimum first the run from Preston to Ogden, and would be required pay him time and a half for not less than four hours, addition to the pay for a day for three hours' work.

It is our contention that the Congress recognized these fferences when it exempted the interurban railroads m the operation of the Railway Labor Act, to prevent e undue hardship they would suffer if the standards of y and conditions of employment applicable to steam ilroads were applied to them.

The only other evidence introduced at the trial as respondent's characteristics and its operation were atements as to its revenues. The gross revenue in 1935 as $514,000.00. The average annual gross revenue over

a period of twenty years, (*) which is the period during which it has been in actual operation, is $697,000.00 per year, so that the decrease in the year 1935 over the average was $183,000.00. The average annual operating revenue during the period from passenger operations was $217,000.00. The passenger revenue in 1935 was $64,000.00. The average annual freight revenue was $404,000.00. The 1935 freight revenue was $403,000.00, or within one thousand dollars of the average during the period of the road's existence. During that entire period, there has been no substantial change in the type of freight operation or the revenues produced by it, whereas the passenger revenue in 1935 was $153,000.00 less than the twenty years' average, that reduction accounting for practically all the reduction in the gross revenue. While there has been no change in the character of the railroad, there has been a change or loss in passenger revenue, due to the increased number of automobiles in use and the building of hard surfaced highways paralleling substantially the respondent's line of railroad. There has been no change in respondent's freight operation from the beginning; the only change has been in the number of passenger trains operated. Originally trains were operated out of Ogden every two hours. They have been reduced to eight trains and busses per day. (R. 138-139.)

An analysis of the carloads of freight business during the last six months' period, which is representative of the entire period of operations, shows that the carloads of freight received by the respondent during that period was 4673 cars, of which 3843 cars, or 82.2 per cent, originated within the State of Utah and terminated on some point along respondent's line; 2336 of this number, 49.98 per cent, or about one-half, originated upon respondent's line and the balance on the lines of various steam and electric connections. In other words, only 830 cars, or only 17.8 per cent, came from without the state. Of the total of 4673 cars received, 1476 cars were of raw materials

*Note.—In using these statistics, petitioner in their petition at p. 7 only use the last ten years.

rocessing plants on respondent's line, 1716 cars were roducts used in the processing of agricultural products lants on respondent's line, and 228 cars were of other s of agricultural supplies. The total of these, or cars out of 4673 cars, were directly tied into agricul- l production or processing purely local in character, cars were construction materials and 441 cars of eral commodities.

During this same period, 4020 cars originated upon ondent's line. Of these, 2400, or 59.7 per cent, were ined to points within the State of Utah and 1620 cars, 0.3 per cent, were destined to points without the state. of these 4020 cars, 927 cars were raw agricultural ducts going to market, 1408 cars were raw agricultural ducts going to processing plants, sugar beets to the ar factories, milk to the condensers, etc., 910 cars were cessed agricultural products going to market, sugar, k, etc., 389 cars were local products produced on pondent's line and being destined to the processing nts, such as lime quarried at points on respondent's line l going to the sugar factories for use therein, and only cars represent other types of shipment. This evidence, en into consideration with the other evidence introduced, ows that the freight service rendered the territory is marily as much of a local character as the passenger vice furnished the people of the territory served. This best be emphasized by concrete examples.

The farmer bring his perishables to the stations, ere cooling facilities are furnished, and leaves them ere and they are then loaded by respondent's employes. . 98.)

The farmers of a locality gather together their agricul- ral products which are to be shipped out and bring em to the cross roads, where cars are spotted by re- ondent for loading, the siding of the respondent being cated on the average of approximately every three miles . 98); there they are loaded into the cars and respondent once, by means of a short train and light locomotive,

delivers them to transcontinental carriers, to be by them carried to the markets (R. 88).

The farmers haul their peas to the vineries, where they are shelled. There they are picked up at frequent intervals, so as to prevent losing their flavor, by small trains of one or two cars each powered by a motored passenger car, and delivered to the canneries (R. 162).

The farmers bring their milk to the cross roads, where it is picked up by respondent in one-car trains, operated at high speed (R. 92), this type of operation being necessary because of the perishable character of the commodity. These trains haul no other commodities (R. 92).

The farmers haul their sugar beets to the beet dumps, where they are loaded into respondent's cars and carried to the sugar factories. The same is true of the lime rock quarried on respondent's line. The type of service rendered is the same whether the condenser or sugar factory is located within or without the state. When processed, these products are then delivered as ordered to the steam lines for shipment to the markets (R. 92).

So much for the freight shipped out; that received consists principally of raw materials and supplies for use by the processing plants located on respondent's line and products to be processed, and building materials for those plants. That constitutes the bulk of the shipments in, and together with the shipment of agricultural supplies constitutes all except ten per cent of the shipments moving into the territory. The net result is that of the entire carload business moving in and out during the six months' period, slightly more than 28 per cent moves outside of the State of Utah, and the greater portion of this results from the purely local service furnished by the respondent. This is shown by the fact that of the 8693 cars moved, only 867, or about ten per cent, can be said to be of shipments not tied into respondent's peculiarly local service, as above set out.

The petitioners in their petition list on page 8 some of commodities handled by the respondent as shown by hibit 26, and then draw the unwarranted conclusion t they are "not commodities ordinarily handled by interurban railroad." This conclusion is not only not rranted by the evidence, but is contrary to it. The timony shows that the handling of all these products, cept about ten per cent, is in the gathering process of al products of the soil and hauling them either direct the steam roads in their original form, or after being ocessed and that the function performed thereby is no fferent than such a gathering and hauling by trucks, other words a purely local function which results in e feeding of the steam roads such traffic as any other al means of transportation would do.

The respondent is an originating and destination rrier; it is not a bridge carrier, or link in any general eam trunk system. It does not receive freight to be livered beyond its own lines. Its sole relationship to e steam lines is as a feeder line (R. 313). It makes no scrimination as to which of the steam lines to which eight is delivered, that being determined by the shipper R. 95).

Now, that being all the evidence introduced at the ial as to the status of respondent, the trial court said could not find otherwise than that respondent is an ectric interurban railroad and did find that it is. Now, is not quite clear as to why petitioners (assuming the urt had the right to determine the question indeendently) claim the court erred, nor is it clear how ey can say there is any conflict in the evidence or why e uncontradicted evidence before the Commission would arrant the Commission in holding the respondent not be an interurban railroad, even if the Commission had e authority to make any such determination. True, they peak of interurban railways changing into railroads of he type of the ordinary steam railroad, as the Piedmont Northern which was considered by the Supreme Court f the United States in the case of *Piedmont & Northern*

Ry. Co. vs. Interstate Commerce Commission, 286 U. S. 299, and we concede that an interurban railroad might so change its characteristics as to develop into a railroad of the type of the ordinary steam railroad, but so far as respondent is concerned no such claim can be made. When it was built, it was but the extension of and the connecting of two street car systems, and as constructed had all the characteristics of an interurban railroad, rendering a service separate and distinct from the type of transportation service, both passenger and freight, furnished by the ordinary steam railroad, or by the particular steam railroad which it paralleled. The evidence as above outlined shows that it has never changed its original physical characteristics, or its type of operation or service rendered, and moreover that it could not, if it desired, transform itself into a railroad of the ordinary steam railroad type, so as to render that type of transportation service which is rendered by a steam railroad, without being rebuilt and relocated as well. In addition to being reconstructed, it would also have to be relocated in order to eliminate grades and curves and be rid of the necessity of using city and town streets as a right of way, with attendant franchise limitations appertaining thereto.

The only change in respondent's situation is the loss of passenger revenue, not because of any change in its physical characteristics, or its type of operation or service, but because of the public preferring another method of transportation, the use of the private automobile, so that the history of its building having shown that it was then an interurban, petitioners would be forced, if they claim that it is a railroad of the ordinary steam railroad type now, to contend that instead of developing into such a railroad by transforming itself into one, it has shrunk into one, which is absurd. They also speak of the preponderance of freight revenue and advert to the percentage of that traffic which is interstate, but stop short of claiming that either is a determinative factor, or that both taken together are probably because it is so obvious that they or either of them cannot be, for the reason that we would then have a railroad, which, with no change in

s physical make-up, would or would not be an interurban, ecause of the manner in which the public uses its service. f passenger traffic falls off, though it be for a reason eyond the railroad's control, as for instance, because f the increase in the use of the private automobile, it oses its interurban character, if for some reason beyond ts control it loses its freight business, as, for instance, y truck competition, then it is thereby changed back into n interurban, and no one could tell what it would be at any ime in the future.

Apparently the petitioners base their contention that the finding by the Commission that respondent is not an interurban railroad is justified solely upon the relationship of its revenues as between those derived from passenger and those derived from freight traffic, regardless of whether the revenue from freight traffic is primarily local in character, as is the case with the respondent, or not. But from the inception of the development of interurban railroads, which commenced in the last years of the preceding century, it was recognized by the public that such railroads were extensively engaged in the carriage of freight. Census Reports, 1902, United States Department of Commerce and Labor; Special Reports of the Census Office, Street Railways, 1902, (R. 261-263) and the same Reports, 1907, (R. 263-265); Report of the Bureau of Census, 1912, entitled "Central Electric Light and Power Stations and Street and Electric Railways" (R. 265-266). These reports further show that their character as interurbans is regardless determined by their physical characteristics, rather than by any relationship of freight and passenger traffic to their business. The Interstate Commerce Commission, as soon as the question came before it and continuously thereafter, except as hereinafter stated, recognized that interurban railroads were extensively engaged in the transportation of freight.

Cincinnati & Columbus Traction Company vs. Baltimore & Ohio Southwestern Railroad Company et al, 20 I. C. C. 486;

St. Louis, Springfield and Peoria Railroad et al vs. Peoria and Pekin Union Railway Company, 26 I. C. C. 226;

Louisville Board of Trade et al vs. Indianapolis Columbus and Southern Traction Company et al, 27 I. C. C. 499;

Chicago, Ottawa and Peoria Railway Company vs. Chicago and Northwestern Ry. Co. et al, 33 I. C. C. 574;

Michigan R. R. Co. vs. Pere Marquette R. R. Co. et al, 741 I. C. C. 486.

It was not until the year 1922 that the Commission, by way purely of dictum, attempted to fix as a standard of determination, as to whether a particular railroad is an interurban, the relationship of its freight traffic to its passenger traffic,—*Proposed Control of Sacramento Northern by Western Pacific Railroad*, 71 I. C. C. 656. This decision was followed by a similar dictum in the same matter reported in 79 I. C. C. 782, which was followed by the *Locomotive Inspection Decision* in 1927, 122 I. C. C. 414, which has heretofore been discussed herein. Commencing, however, in 1921, the Interstate Commerce Commission, in each and every year that it made an annual report to the Congress, and including that of December, 1935, recommended either that electric railroads whose freight revenues preponderate over their passenger revenues, or that electric railroads which interchange standard freight equipment with steam railroad lines and participate in through interstate freight rates with such lines, be declared to be not interurban railroads. Nevertheless, Congress steadfastly refused to follow such recommendations, as shown by its enactments up to the present time. Indeed, as early as 1910, Congress recognized that interurban railroads might be engaged in the general business of transporting freight, Interstate Commerce Act, Section 15 (3). In the year 1918, Congress enacted a law covering railway mail pay service on urban and interurban electric railways (40 Stat. L. 748). This Act empowered the Commission: "to fix and determine from time to time

e fair and reasonable rates and compensation for the ansportation of mail matter by urban and interurban ectric railway common carriers."

Two years prior to the passage of this Act, that is, the year 1916, Congress had passed the Railway Mail ervice Pay Act applicable to transportation of mail matter railway common carriers (39 Stat. L. 412). In a formal se, the Commission refused to classify interurban electric ilways as "railway common carriers," but instead held l of the electric railways of the country, except electrified ctions of steam railroads, subject to the provisions of e statute of July, 1918 (40 Stat. L. 748), which covered ilway mail pay service on urban and interurban electric ilways. (58 I. C. C. 455.) In the decision of that case, own as the *Electric Railway Mail Pay* case, the Commis-on, among other things, said:

> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads so far as mail transportation is concerned. Many of them do considerable freight and express business, in addition to their passenger business. • • • A few lines receive greater revenue from freight and express than from passenger business."

In a second *Electric Railway Mail Pay* case, (98 I. C. C. 37), decided June 2, 1925, to which respondent was a arty, the Commission used this language:

> "Mail service is now authorized on the lines of 311 urban and interurban electric railway companies."

So, we have the Commission in both of these electric ilway mail pay cases recognizing the meaning of the rm "interurban electric railway," as including electric ilways, whose revenue from freight exceeds that from assengers, including respondent, and it is in accordance ith that decision that respondent has received and still eceives its pay for carrying mail (R. 95), and these cases lustrate the fact that commencing with the year 1925

the Commission has been inconsistent in its holdings with respect to the matter, the second railway mail pay case having followed the decision in the Locomotive Boiler Inspection case, already referred to.

In three of the provisions of the Transportation Act, 1920, interurban electric railways were specifically mentioned and exempted from the act, viz. Section 1 (22), excluding interurban railways from the necessity of obtaining a certificate of convenience and necessity before constructing any new lines.

Section 20 (a), which exempted interurban electric railways from its provisions requiring the approval of security issues by the Interstate Commerce Commission.

Title III of the Transportation Act, 1920, created the original Railroad Labor Board and by Section 1 thereof excluded from its provisions interurban electric railways. Under this Title of the Act, the original United States Labor Board case arose in December, 1920, and the Labor Board determined that it did not have jurisdiction over independently operated interurban railways. (Decision No. 33—Docket 26-A.)

The various interurban exclusion sections of the Transportation Act above referred to are herein set out in haec verba. U. S. C. A., title 49, sec. 73. "When used in this section the term 'carrier' means a carrier by railroad which, during any part of the period of Federal Control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and the term 'test period' means the three years ending June 30, 1917."

U. S. C. A., title 49, sec. 77. "When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water whose railroad or system of transportation was under Federal control on February 29, 1920, or which had prior to February 28, 1920, engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation was under Federal control on February 29, 1920; but does not include a street or interurban electric railway not under Federal control on February 29, 1920, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both."

U. S. C. A., title 49, sec. 1 (22). "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

U. S. C. A., title 49, sec. 15a (1). "When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this chapter, excluding (a) sleeping car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation, or engaged in the general transportation of freight, and (d) any belt line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway

operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents."

U. S. C. A., title 49, sec. 20a (1). "As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter."

U. S. C. A., title 45, sec. 151. . . . . "Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

In 1933, Congress enacted Section 77 of the Bankruptcy Act, (U. S. C. A., title 11, sec. 205 (m)), in which it specifically recognized that an interurban electric railway might derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment. This is to be found in subparagraph (m) of said Section 77, which reads:

> "The term 'railroad corporation' as used in this act means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation, or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."

After this long history of legislative action culminating in the passage of the Bankruptcy Act in March, 1933,

can there by any question that Congress has expressly decided that an interurban electric railway may transact an unusually large freight business, even to the point of deriving more revenue from the transportation of freight than it does from any other source, and irrespective of its intra- or inter-state character? Congress specifically said so in the Federal Control Act in 1918, in Sections 204 and 209 of the Transportation Act, 1920, and in paragraph (m) of Section 77 of the Bankruptcy Act in 1933. All of these statutes specifically stating that interurban electric railways may derive a large portion of their revenues from the transportation of freight merely confirm and emphasize that the handling of freight or its character or the amount thereof is not a determining factor in determining whether a railroad is an "interurban electric railway."

It is in spite of this legislative definition of an interurban railroad that the Commission in its later decisions, cited on page 21 of petitioners' petition, has held that only electric railroads dependent upon passenger traffic for the bulk of their revenues are interurban railroads, and it is in spite of that definition that the Interstate Commerce Commission held the respondent not to be an interurban railroad, because of the relationship of its freight revenues to its passenger revenues. (R. 314-325) 214 I. C. C. 707.

Also this court has recognized that the amount of freight revenue as compared with passenger revenue is not determinative of the question as to whether an electric railroad is an interurban railroad.

Omaha & Council Bluffs Street Ry. Co. vs. Interstate Commerce Commission, 230 U. S. 324.

Spokane & Inland Empire R. R. Co. vs. Interstate Commerce Commission, 241 U. S. 344.

True, petitioners rely upon *Piedmont & Northern vs. I. C. C. supra*, which has already been referred to. That was a case arising under Section 1 of the Interstate Commerce Act, which requires a certificate of convenience

and necessity from the Interstate Commerce Commission before the construction of any new line of railroad, but excepts interurbans from its provisions. Piedmont & Northern was intending to extend its lines materially and as to this the court found that such proposed new construction without permission of the Commission would be in direct violation of the policy of the Transportation Act, 1920.

The court, speaking through Mr. Justice Roberts, said:

> "In *Texas and P. R. Co. vs. Gulf C. & S. Ry. Co.*, 270 *U. S.* 266, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an 'industrial track,' as that phrase is used in paragraph (22), although by strict construction it was such."

The court further said:

> "Thus it would become a connecting link in a new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines, leading from Florida and the southeast to the northern gateways • • • • "
>
> "Petitioner's own estimate contained in its application to the Commission is that the extension would gain new business diverted from steam railroads of 82,320 cars a year. • • • "

These quotations from the court's decision are clearly the basic factors on which the decision was predicated.

It is a clear case of an interurban attempting to transform itself into a railroad of the ordinary steam railroad type. This is emphasized by the decision in the other case upon which petitioners rely—*United States vs. Chicago, North Shore & Milwaukee R. R. Co., supra.* In that case the Supreme Court referred to the former case of the Piedmont & Northern, supra, and said:

> "The facts differentiate the present case from *Piedmont & Northern Ry. Co. vs. I. C. C.*, 286 *U. S.* 299. There the railway was predominantly a carrier of interchange carload freight and the proposed extension of line which was the subject of that litigation had as its object the creation of a link in a trunk line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually."

By this reference in the North Shore case decision to the Piedmont & Northern case decision, the court itself distinctly holds that the Piedmont & Northern's position was determined solely under the exclusive language of Section 1 of the Interstate Commerce Act, and that the extensions proposed to that railroad would have been a violation of the policy and purposes of the Transportation Act with regard to the extension of lines, and therefore limited the effect of that decision to the precise question before the court.

In the North Shore case, the court makes reference to the findings made by the trial court. It does not quote them, but they are herein set out:

> "Congress * * * described these railways as street, suburban and interurban electric railways * * * and by doing so adopted a descriptive term which had the sanction of time and common usage. Among the common characteristics * * * are that they use electric power in the transportation of passengers or freight or both, in intrastate commerce, occupy city streets and highways in addition

to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds without agents for passengers, have short radius curves and operate part of their system under municipal and village franchise authority and restrictions." (Docket 10,067.)

The Supreme Court in its decision used this language with regard to the foregoing findings:

> "The District Court, after making detailed and elaborate fact findings concluded as a matter of law that the railway was an independently operated electric interurban railway expressly excepted from the requirements of the section (that is Section 20a having the same exclusive language), the question is whether the facts found warrant the decision."

Incidentally the Supreme Court held that the amount of freight handled is not a determining factor. In stating the facts with respect to the road's handling freight, the court said:

> "Appellee's tracks are of standard gauge and are physically connected with those of four steam railroads at some thirteen points, and with those of three electric lines. Eight connections are used for handling interchange carload freight. The railroad has substantial facilities for serving various industries located on its lines, such as side, industrial, team and switch tracks, and freight classification tracks. It owns seven electric locomotives which are of a small type and unable to haul freight trains of the size usually employed by steam railroads, and 114 freight cars which have no electrical equipment and are interchangeable with steam railroads. Sixteen local freight tariffs are published; in 206 tariffs the railroad participates as initial carrier, and in more than 800 as a delivering or intermediate carrier, in conjunction with steam railroads.

"The total transportation revenue in 1930 was over $6,000,000, about 76 per cent from passenger traffic and about 22 per cent from freight. This ratio has been substantially maintained for some years. In 1930, 87 per cent of carload freight traffic was interchange and 78 per cent of all freight traffic was interline, but only 42 per cent of freight revenue was derived from interline business.

"Locomotives are not employed in the passenger service, the cars having installed electrical equipment and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. A merchandise package delivery freight service is supplied by cars similar to baggage cars on steam railroads, having self contained electric equipment, operated from the loop in Chicago to Milwaukee in trains of from one to five cars. Ae certain points gantlet tracks are required for handling freight cars, as the clearances on the main line are insufficient to permit their passage. Grades are much heavier than those customary on steam railroads, and some of the curves are of so short a radius as not to permit the passage of a steam locomotive. The company maintains no facilities for receipt or delivery of carload freight at its terminii in Chicago and Milwaukee, and cannot accomplish interchange of such freight at either, connections for this purpose being outside those cities."

After the court stating these facts the opinion continues:

"We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier."

The history of the respondent is slightly different from that of the North Shore. It was constructed, it is

true, to give a typically interurban passenger service, but at the same time a typically interurban freight service of a purely local character. Incidental to that service, it was necessary to interchange freight in carload lots, and a small percentage of that interchanged freight may not be directly connected with the local purpose, but clearly it is incidental to it, and no claim is made that hauling of freight interfered with the road's performance of its passenger function.

The only reason, however, that the history of the respondent is in any wise different from that of the North Shore is that it was constructed to serve a territory which was purely agricultural in character and more sparsely settled, and the population could only be increased by a more intensive agricultural development, so that it was necessary for the respondent from the very onset to render not only an additional service to that which had been furnished by the then existing steam transportation railroad, but a service which was as distinctly interurban in character as the passenger service furnished by the respondent.

The conclusion both by logic and authority is irresistible that the trial court was right in its refusal to consider the character of respondent's freight business as in any wise determinative of the question as to whether respondent is an interurban railroad, and the test it adopted is the only true test, namely, that if its physical characteristics are such that its function is limited to performing a type of transportation service, whether passenger or freight, which is distinct and separate from that which is performed by an ordinary steam railroad, and adheres to that function, the railroad is an interurban railroad and remains such until it changes its physical characteristics.

Likewise the conclusion is irrestible that the determination of the Interstate Commerce Commission as to the respondent not being an interurban railroad is contrary to the uncontradicted evidence before it and is against law, arbitrary, and without substantial evidence to support

it; in other words the net basis of the Commission's decision is that because the passenger revenues of respondent have declined not because of any change in its characteristics or operation, but because of the use by the public of a new type of transportation, the private automobile, over which it has no control, and the consequent diminution in passenger revenue, the respondent has been transformed from an interurban railroad, as it was builded to be and has ever since operated, into a railroad that is not an interurban. This is an absurd conclusion (R. 78).

Fifth. The constitutionality of the act, as to the respondent, was by the amended bill of complaint in good faith attacked by the respondent in the suit herein. It then became necessary for the court to determine the fact as to the status of the respondent as preliminary to the determination of the constitutional question, and the trial court had the right and it was its duty to determine that status independently of any determination thereon by the Interstate Commerce Commission.

This suit is grounded upon the proposition that respondent is an interurban electric railroad exempt from the provisions of the Railway Labor Act, because it claims that it is in fact such a railroad; that notwithstanding it claims that in fact it is such a railroad the District Attorney claims that Congress has vested in the Interstate Commerce Commission authority to determine respondent's status in that regard, and pursuant to that authority the Commission has determined that respondent is not an interurban railroad, and that finding is binding upon respondent; that if such finding is construed to be binding, then it violates respondent's constitutional rights, as above stated,—this being an attack upon one particular phase of the Act applicable only to respondent and interurban railroads similarly situated, and further the Act as a whole and in certain particular sections thereof is unconstitutional, this being a general attack applicable to all railroads, whether interurban or not.

The first question that arises under such a pleading, at the trial is: "Which proposition will the court determine

first, whether respondent is exempt from the provisions of the Act, or whether it is unconstitutional under the special or general attack upon the constitutionality of the Act?" The answer to this question is not difficult, either upon principle or authority. Manifestly a court should not determine the constitutionality of a legislative act, either National or State, unless it is necessary to make the determination. If exemption from its provisions is claimed by respondent, the court will determine that question first, because if respondent is exempt, there will be no necessity for the determination of the constitutionality of the Act, either those provisions especially applicable to respondent and those similarly situated or applicable to all who are held to come within its purview, and it is only in the event that the claim of exemption is denied that it will become necessary to determine the constitutional question. *Lee, Comptroller vs. Bichell et al*, 292 *U. S.* 415. *Blair vs. United States*, 250 *U. S.* 273, *Siler vs. Louisville & N. R. Co.*, 213 *U. S.* 175, *Modern Woodmen of the World vs. Casados*, 15 *Fed. Supp.* 483.

Now, in taking the first step, in determining the first question, in determining the question as to whether respondent comes within the purview of the Act, there will ordinarily be no more difficulty than in determining any other question of fact or law, and it may be either. But where, as in this case, the claim is asserted that the court is not free to determine whether respondent comes within the Act, because that matter has been determined by an administrative body pursuant to legislative authority, and that determination is binding upon the court, a preliminary question arises, namely: Can the finding bind the court when it is engaged in determining a preliminary question necessary to be determined in the exercise of its jurisdiction, to determine whether it will pass on constitutional questions, though it may be binding in other cases? We are not here dealing with the question which we have heretofore discussed, namely, whether a finding is binding, notwithstanding Congress has not made it binding. We are assuming that it is ordinarily binding either because Congress has specifically or by necessary

implication said it is binding, or else that it is held that such manifestation of intention is unnecessary. Nor are we dealing with the question, heretofore considered, namely, as to whether such finding is arbitrary, not supported by the evidence, or contrary to and against law. We are assuming that the finding is not subject to those objections, which apply in all cases; we are assuming that it is binding ordinarily, but is it binding in this class of case, that is, in a case involving constitutional rights of liberty or property? This is the precise question which arose in the case of *St. Joseph Stockyards Co. vs. United States*, 298 *U. S.* 38. In that case, Chief Justice Hughes, speaking for the majority of the court, holds that in such a case such a finding is not binding (p. 51). Mr. Justice Brandeis, though he concurs in the result, differs with the majority on the point, although agreeing that if a constitutional question involving liberty is raised, the rule would govern. Justice Cardoza (with whom Justice Stone concurs) agrees with the majority, but only on the ground of stare decisis, so that the rule announced by the majority in that case is the law, and therefore in a case involving the rights of liberty or property, the finding of an administrative body of any fact necessary to be determined is not binding upon the court.

It is undoubtedly true that the rule is subject to certain limitations. One is that the constitutional questions are properly raised by the pleading, but no question is made by petitioners that they are not so pleaded in this case. The other is that the constitutional questions are brought into the case in good faith, and no claim has ever been asserted by petitioners that they are not in this case. Indeed an examination of the record before the Interstate Commerce Commission would disclose that that question was raised at the hearing before the Examiner at the very outset. So, under this rule, the court in this case was not bound by the finding of the Interstate Commerce Commission, even if it was not, as he found it was, contrary to and against law, and the court's finding ought not to be disturbed, even

though it be held that he was wrong in finding that the finding of the Commission was contrary to and against law, and can only be disturbed if his finding is not supported by the evidence, but we think we have shown conclusively it was.

The court having found that respondent is an interurban railroad and not within the Act, and therefore that it is unnecessary to determine the constitutional questions raised either by the special or general attack upon the Act, the next question is: "What shall the court do!" And, of course, the answer is that having properly acquired jurisdiction of the cause, the court will proceed to its final determination, and that is true even when because of the finding it develops that no Federal question is involved, which is not the case here, because here a Federal question is involved.

The cases heretofore cited under this heading sustain all of the points herein made, but the case of *Modern Woodmen of America vs. Casados, supra,* is particularly in point. In that case the plaintiff in its pleadings claimed that it was a fraternal insurance society and as such exempt from a statute of New Mexico imposing a tax upon insurance premiums, that the state tax commissioner claimed that it was not exempt and was threatening to subject it to the heavy penalties provided in the Act, and to revoke its license for failure to pay the tax, but that if it were not exempt then that the State Act violated certain provisions of the Federal Constitution. The only claim made by the defendant in the case as to the applicability of the statute on a motion to dismiss the bill was that the plaintiff was in fact an ordinary insurance company, but masquerading as a fraternal society, it being admitted that fraternal societies were exempt under the statute. The court determined from an examination of the allegations of the bill that the plainitff is a fraternal society, exempt under the statute. It declined to pass upon the constitutional questions involved and enjoined the collection of the tax. Except that the statute which was under attack in that case was a State and not a Federal

tute, which of course makes no difference, and except t in that case the finding by an administrative body was involved, which makes no difference, because that tter is governed by the rule announced by Chief Justice ghes, the case is precisely like this case.

So there can be no doubt Judge Johnson was not y justified in finding, but it was his duty to find dependently upon the question whether respondent is interurban railroad.

It may be suggested that the Supreme Court in the e of *Virginian Ry Co. vs. System Federation No.* 40, 0 *U. S.* 515, since the decision in this case by the trial irt, has decided that the Railway Labor Act here in estion is constitutional and therefore that there is now constitutional question involved in this case. Even re that the case to the fullest extent, it would make no fference, because in determining whether in a case there e constitutional questions involved, so as to enable the al court independently to determine the facts necessary decide them, does not depend upon whether they would, en reached, be determined in favor of respondent, but ether they are raised in good faith, and we have shown this case that they were. But in the Virginian Ry. se, supra, the constitutional questions herein raised were t determined, even those sections of the law subject general attack, certainly not those subject to special tack, because the Virginian Railway was not an electric e, and they are still in this case. We still insist, then, at there are certain constitutional questions as to the w which were not involved in the above case, and which spondent or any railroad may raise, but a discussion of em is not pertinent to this brief, because not going to e question whether the petition for a writ of certiorari erein should or should not be granted.

(2) There is no reason for granting the writ upon this tition.

The justification for the unusually elaborate statement, which has heretofore been made in this brief is

to show that there is no reason for granting this writ. If, as we have argued, the trial court had a right to determine independently the status of respondent, as to its being or not being an interurban railroad, then its finding that respondent is an interurban railroad will, under well established principles, be not disturbed by this court, especially when concurred in by the Circuit Court of Appeals. In the case of *Virginian Railway Company vs. System Federation No.* 40, etc., 300 U. S. 515, this court said:

> "The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by the evidence. We accordingly accept them as the conclusive basis for decision. * * * *"

If, as we contend, the trial court had the right independently to determine the status of respondent as to its being or not being an interurban railroad, and such finding of the trial court being based upon the evidence before it as to the particular facts relating to it, there necessarily will be no opportunity in this case for establishing any general principle which would be applicable to other cases, and, therefore no occasion for granting the writ applied for herein. If, on the contrary, the trial court was limited to a determination as to whether the finding of the Interstate Commerce Commission was based upon substantial evidence and not contrary to law, the fact that the trial court, upon the same evidence that was before the Commission, determined the status of respondent to be contrary to that determined by the Commission, conclusively establishes that the Commission's finding was not supported by substantial evidence and was contrary to and against law, and that finding by the trial court, concurred in by the Circuit Court of Appeals, should be held to be as conclusive upon this court as was the finding of the two lower courts in the Virginian Railway Company case, *supra*. Being based upon the particular facts before the Commission and before the trial court, relating to this respondent and not some other railroad, no principle could

be established in this case which would govern as to the status of any other railroad.

The petitioners make some point of the fact that, instead of the trial court finding that the finding of the Commission was arbitrary or not supported by the evidence, it found that it was "contrary to and against the law," because, as it said, it was against the uncontradicted evidence; but what difference does it make? If the finding of the Commission was based upon evidence which was irrelevant to the issue it was against law; likewise, if it was not supported by any substantial evidence; because to show that the evidence was substantial it must be pertinent to the issue, it cannot be irrelevant thereto. If the Commission made the finding solely upon irrelevant evidence; if it used as the determinative factor that which has no real bearing upon the issue, as it did when it found the issue solely upon the relationship of the respondent's freight revenue to its passenger revenue, then it is arbitrary, because the basis, or test used, is arbitrary.

Now, the principal reason given by the petitioners for the granting of the writ herein is that to permit each railroad claiming to be an interurban railroad and exempt from the act to have its status judicially determined will result in "paralysis of the plan established by Congress under the act." Their contention amounts to this: that Congress can enact a statute governing certain citizens and make its violation by any citizen coming within its purview a misdemeanor, and then provide that whether a citizen comes within the purview of the statute shall be determined by an administrative body, and if the citizen insists upon his right to have that question determined by a judicial tribunal, that constitutes a paralysis of the Congressional plan. The answer to this contention is two-fold: first, that Congress did not intend any such result, and, second, if it did, the plan should be paralyzed.

The only other reason given by petitioners is that to permit a judicial determination by the courts of the status of the respondent as to its being an interurban will result in delay in the administration of the statute.

To this we answer that it is far more important
question be rightly determined than that it be
determined; and that to say, that because a judi
nation takes time, a citizen charged with vi
criminal statute of the United States may be
conclusively or otherwise, by an administrative
determination of the question, either in the crimin
against him or in a suit to prevent such pro
means that government by administrative bodies
substituted in the United States for government

CONCLUSION

Wherefore, it is respectfully submitted that the
for a writ of certiorari to review the judgment
Circuit Court of Appeals for the Tenth Circuit sh
denied.

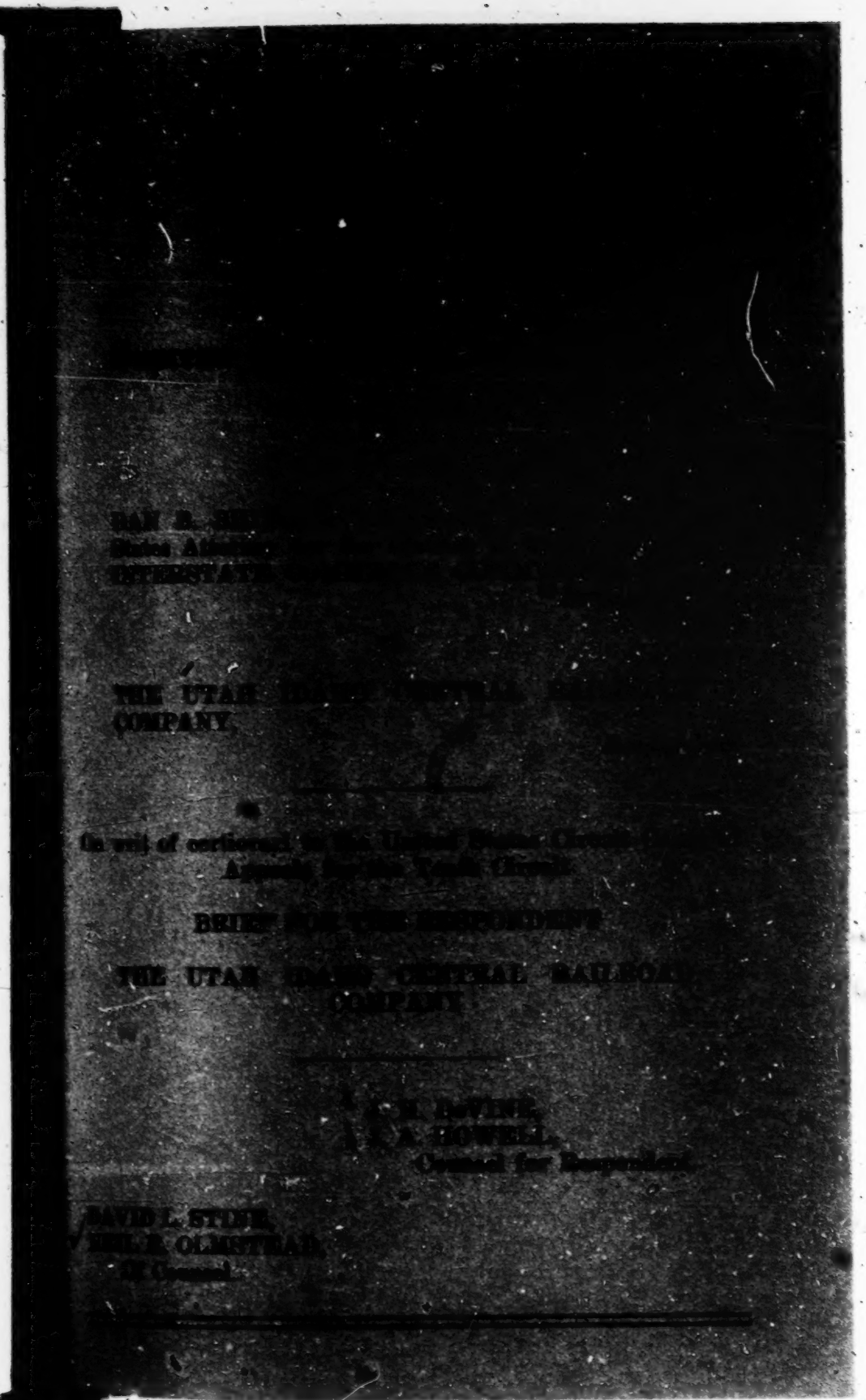
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No. 28

IN THE

Supreme Court of the United States

October Term, 1938

DAN B. SHIELDS, Individually and as United States Attorney for the District of Utah, and the INTERSTATE COMMERCE COMMISSION.

Petitioners,

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

THE UTAH IDAHO CENTRAL RAILROAD COMPANY

J. H. DeVINE,
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Counsel for Respondent.

DAVID L. STINE,
NEIL R. OLMSTEAD,
Of Counsel.



INDEX

	Page
The Issues	1
The Evidence	5
The Questions Presented	84
Summary of Argument	85
Argument:	
I. The uncontradicted evidence introduced at the trial and before the Interstate Commerce Commission shows that respondent is an interurban	88
II. The finding by the Interstate Commerce Commission that respondent is not an electric interurban railroad is arbitrary, not supported by the evidence, and is against and contrary to law	41
III. The finding of the Interstate Commerce Commission that respondent is not an interurban railroad is not in any wise binding upon the Court	73
1. The Congress in enacting the proviso has not only not manifested an intention that it should be binding, but has evidenced in the Act itself a contrary intent	78
2. The Commission's authority does not extend to a determination as to respondent's status as to being or not being an interurban railroad	89
3. The Congress has not manifested its intention that the determination of the Commission shall be binding upon the Courts even if it was not arbitrary, capricious, or not supported by substantial evidence	90
4. In the absence of express limitations, the Courts have authority to try de novo the question as to the status of respondent	92
5. The question as to respondent's status as an interurban is a mixed question of law and fact	96
6. The constitutionality of the Act has been challenged in good faith by the respondent	98

CITATIONS

Page

The Cases:

Acker vs. United States, 298 U. S. 426 81

Application of Section 15 (a) of the Interstate Commerce Act to Electric Railways, 86 I. C. C. 751 56

Bates & Guild Co. vs. Payne, 194 U. S. 106 83

Blair vs. United States, 250 U. S. 273 99

Butte, Anaconda & Pacific Railway Co. vs. United States, 290 U. S. 127 78

Coha vs. United States, 152 U. S. 221 83

Campbell vs. United States, 107 U. S. 407 85

Cedar Rapids & Iowa City Railway and Light Co. vs. Chicago & Northwestern Ry. Co., 13 I. C. C. 250 49

Chicago and Milwaukee Railroad Co. vs. Illinois Central Railroad Co., 13 I. C. C. 20 49

Chicago, Ottawa & Peoria Railway Co. vs. Chicago & Northwestern Ry. Co., et al, 33 I. C. C. 574 52

Cincinnati, etc., Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 184 41

Cincinnati & Columbus Traction Co. vs. B. & O. Southwestern R. R. et al., 20 I. C. C. 486 50

Crowell vs. Benson, 285 U. S. 22 ..... 41, 97

Decatur vs. Paulding, 14 Pet. 497 ..... 83, 85

Deitch vs. Staub, 115 Fed. 309 89

Electric Railway Mail Pay Case, 58 I. C. C. 455 ..... 28, 63

Electric Railway Mail Pay Case, 98 I. C. C. 737 ..... 28, 63

Ex parte Reed, 100 U. S. 13 83

Great Northern Ry. Co. vs. United States, 277 U. S. 172 78

Houston vs. St. Louis Independent Packing Co., 249 U. S. 479 ..... 83, 84, 86, 91

In re Aliens, 231 Fed. 335 84

In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power other than Steam Power, etc., 122 I. C. C. 414 ..... 47, 54, 56, 67

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88 81

	Page
Interstate Public Service Company Case, 117 *I. C. C.* 228	61
Kendall vs. United States, 12 *Peters* 524	85
Lee, Comptroller, vs. Bichell et al, 292 *U. S.* 415	99
Louisville Board of Trade et al, vs. Indianapolis, Columbus & Southern Traction Co., et al, 27 *I. C. C.* 499	50, 52
Michigan R. R. Co. vs. Pere Marquette R. R. Co., et al, 74 *I. C. C.* 496	50
Modern Woodmen of the World vs. Casados, 15 *Fed. Supp.* 483	99, 101
Morgan vs. United States, 298 *U. S.* 468	82
Morrill vs. Jones, 106 *U. S.* 466	85
Peterson vs. United States, 287 *Fed.* 17	84
Pick Mfg. Co. vs. General Motors Corp, 299 *U. S.* 3	41
Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission, 286 *U. S.* 299	36, 63, 93
Proposed Control of Sacramento Northern Railway by Western Pacific Railroad, 71 *I. C. C.* 656	55
Proposed Control of Sacramento Northern Railway by Western Pacific Railroad, 79 *I. C. C.* 782	55
Riverside Oil Co. vs. Hitchcock, 190 *U. S.* 316	83
Roberts vs. United States, 44 *C. Cl.* 411	85
Schechter vs. United States, 295 *U. S.* 495	73
Shannahan vs. United States, 303 *U. S.* 596	74
Sherlock vs. United States, 43 *C. Cl.* 161	85
Siler vs. Louisville & N. R. Co., 213 *U. S.* 175	99
Spokane & Inland Empire R. R. Co., vs. U. S. 241 *U. S.* 344	62
St. Joseph Stockyards Co., vs. United States, 298 *U. S.* 38	44, 82, 100
St. Louis, Springfield & Peoria R. R., et al, vs. P. & P. U. Railway Co., 26 *I. C. C.* 226	50, 52
Swayne & Hoyt, Ltd., vs. United States, 300 *U. S.* 297	82
Tang Tun vs. Edsel, 223 *U. S.* 673	83

Page

Texas & N. O. R. Co. vs. Brotherhood of R. & S. S. Clerks, 281 *U. S.* 548 41

United States vs. Barrows, 1 *Abb. U. S.* 351 84

United States vs. Chicago, North Shore & Milwaukee Ry. Co., 288 *U. S.* 1 ..... 54, 64, 70, 93, 94

United States vs. Grimaud, 220 *U. S.* 506 91

United States vs. Idaho, 298 *U. S.* 105 ..... 93, 94

United States vs. Louisville & Nashville R. R. Co., 235 *U. S.* 314 81

United States vs. Sibray, 178 *Fed.* 144 84

United States vs. Symonds, 120 *U. S.* 46 85

United States vs. Village of Hubbard, Ohio, 266 *U. S.* 474 84

Virginian Railway Company vs. System Federation No. 40, 300 *U. S.* 515, 542 ..... 41, 102

Virginian Ry. Co. vs. United States, 272 *U. S.* 658 81

West End Improvement Corporation vs. Omaha & Council Bluffs Railway and Bridge Co., et al, 17 *I. C. C.* 239 49

Wilkins vs. United States, 96 *Fed.* 839 84

Williamson vs. United States, 207 *U. S.* 425 85

Statutes:

Bankruptcy Act of 1933, c. 204, 47 Stat. 1467, 1482 (U. S. C., Title 11, Sec. 205 (r)) 51, 53, 58, 61, 72

Bankruptcy Act of 1933, as amended August 27, 1935, c. 774, 49 Stat. 911, (U. S. C., Title 11, Sec. 205 (m)) 51, 53, 60, 61, 72

Carriers Taxing Act of 1935, c. 813, 49 Stat. L. 974-977 ..... 75, 76, 77

Carriers Taxing Act of 1937, c. 405, 50 Stat. L. 440 (U. S. Code, Title 45, Sec. 261) 75, 76, 77

Interstate Commerce Act, c. 91, 41 Stat. 456, 478 (U. S. C., Title 49, Secs. 1(3), 1(4), 1(22), 3(3), 15(3), 15a, 16(12), 20a (1), 73a, 77a 50, 51, 52, 56, 57, 61, 65, 69, 70, 72, 80

Locomotive Inspection Act, c. 355, 43 Stat. 659 (U. S. C., Title 45, Sec. 22) 55, 61

	Page
Packers and Stockyards Act, c. 64, 42 Stat. 167 (U. S. C., Title 7, Sec. 216)	32
Railway Labor Act of 1920, c. 91, 41 Stat. 491	76
Railway Labor Act of 1926, c. 347, 44 Stat. 577	76
Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185 (U. S. C., Title 45, Secs. 151-163):	
Sec. 1, First	1, 35
Sec. 2, Eighth	2
Sec. 2, Tenth	3
Sec. 3, First (a)	92
Railway Mail Service Pay Act, 39 Stat. L. 412	67
Railway Mail Service Pay Act, as amended, 40 Stat. L. 748 (U. S. C., Title 39, Secs. 541-566)	67, 76
Railroad Retirement Act of 1934, c. 868, Sections 1-14, 48 Stat. 1283-1289	77
Railroad Retirement Act of 1937, c. 382, Part I, Section 1, 50 Stat. 307 (U. S. C., Title 45, Sec. 228a)	77
Shipping Act, c. 451, 39 Stat. 737 (U. S. C., Title 46, Sec. 828)	82
Social Security Act, 49 Stat. 620, (U. S. C., Title 42, ch. 7)	96, 97
Transportation Act of 1920, c. 91, Sec. 204, 208, 209 41 Stat. 460, 469, 489, (U. S. C., Title 49, Secs. 73, 77, 15a(1), 20a	28, 50, 51, 61, 63, 64, 78, 94
U. S. C., Title 7, Sec. 2 and 22	83
Miscellaneous:	
Annual Reports of the Interstate Commerce Commission, 1924 through 1935	57, 58, 59, 60
Special Reports of the Bureau of Census, Street and Electric Railways, 1902, 1907, (Excerpts quoted R. 261-265)	49
Special Reports of the Bureau of Census, Central Electric Light and Power Stations and Street and Electric Railways, 1912 (excerpts quoted R. 265)	49

No. 28

IN THE

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DAN B. SHIELDS, Individually and as United States Attorney for the District of Utah, and the INTERSTATE COMMERCE COMMISSION,

Petitioners,

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

THE ISSUES

As stated by counsel for petitioners in their brief, the respondent brought an action against the petitioner Dan B. Shields, Individually and as United States Attorney for the District of Utah, praying for an injunction to restrain him as such District Attorney from prosecuting respondent and its officers for failure to comply with the Railway Labor Act, respondent claiming that it is an interurban railroad exempt from the provisions of the Act, in accordance with the proviso contained in Section 1, First, reading as follows:

> "Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce

> Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso;"

and that if it be subject to the Act then the same is unconstitutional as to it.

However, in order that the case may be presented properly from the point of view of the respondent, we deem it necessary to state more in detail the issues in the case than the same are stated in the brief of opposing counsel.

The amended bill of complaint of respondent alleged:

1. That respondent is a common carrier operating an interurban electric railroad between Ogden City in the State of Utah and the City of Preston in the State of Idaho, not a part of any general steam railroad system of transportation, or a part of the general steam railroad system of transportation operated by electric power, and as such exempt from the provisions of the Railway Labor Act, setting out in detail the facts in relation to its history and its physical characteristics, which show it to be an interurban railroad, which facts will hereinafter in a synopsis of the evidence be stated more in detail. (R. 24.)

2. That Paragraph Eighth of Section 2 of said Act provides that:

> "Every carrier shall notify its employes by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employes will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth and fifth paragraphs of this Section;"

that said Mediation Board has prescribed the form of the notices and the times and places at which the same shall be posted by the respondent and, notwithstanding the respondent is exempt from the provisions of said Act, has ordered the respondent to post such notices to its employes, and that re-

spondent has refused to comply with that order, and has not posted such notices. (R. 23.)

3. That the petitioner, Dan B. Shields, threatens to prosecute the respondent for its failure to comply with said order of the Mediation Board and its failure to post said notices, and subject the respondent and its officers and agents to the penalties provided for in the Act, and that he will unless restrained by the court, proceed with such prosecutions. (R. 26.)

The penalties provided by the Act are a fine not less than $1,000.00, nor more than $20,000.00, or imprisonment for not more than six months, or both such fine and imprisonment, for each offense, and every day's failure to comply constitutes a separate offense. (Section 2, Tenth.)

The complaint then sets forth the particulars in which it is claimed that the Act is unconstitutional as to the respondent, which are not herein set out, because they were not considered by the trial court on account of its finding that the respondent is an interurban railroad not subject to the provisions of the act, but will be considered later in the argument. (R. 29-32.)

The complaint also sets out the facts which show that if it be subjected to the threatened prosecutions, it will suffer irreparable injury and damage, and that it has no plain, speedy and adequate remedy at law, which allegations are not herein referred to in detail, because the petitioners do not in this court complain of the finding by the trial court as to the truth of these allegations. (R. 23-24.)

The petitioner Shields, in addition to denying the allegations of the complaint, as above set out, alleges that upon request of the Mediation Board proceedings were instituted before the Interstate Commerce Commission to determine whether the respondent came within the above proviso exempting certain carriers from the Railway Labor Act; that the Commission held a hearing, at which respondent was represented and introduced evidence, and that prior to the bringing of this action the Commission handed down a decision, in which it held that the respondent's lines "do not constitute a street, interurban or suburban electric railway within the meaning

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of the exemption proviso," (R. 36), and attached to the answer a copy of the report of the Commission, the report being found at R. 42-53.

The answer then alleges: "The Commission's determination that an electric railway does not come within the proviso set forth in the preceding paragraph is controlling, unless arbitrary, unreasonable or not based upon substantial evidence." (R. 36.)

Subsequently the petitioner Interstate Commerce Commission was permitted by the court to file its petition in intervention in the case, in which it set forth substantially the same matters set forth in petitioner Shields' answer. (R. 39-41.)

To the answers of petitioners, respondent filed a reply, in which the allegation of the answer and petition in intervention with respect to the hearing before the Interstate Commerce Commission and its report were admitted, and then alleged "that said report of said Interstate Commerce Commission was capricious, arbitrary and contrary to the uncontradicted evidence therein and is wholly without any evidence to support it; that the only evidence introduced at said hearing was the evidence introduced in behalf of The Utah Idaho Central Railroad Company; that no evidence was introduced by any of the other parties in conflict therewith, and that said evidence introduced by said plaintiff conclusively showed that the plaintiff is an interurban railroad, coming within the provisions of the exemption in Section 1, First, of said Railway Labor Act, and notwithstanding such evidence was uncontradicted and conclusively so shows, said Interstate Commerce Commission arbitrarily, capriciously and unreasonably made a report to the contrary, in violation of the rights of the plaintiff, namely, that the plaintiff is not an interurban railroad coming within the proviso exempting it from the operation of said Railway Labor Act, and said report is not supported by any evidence introduced at said hearing and the same is not binding on this plaintiff." (R. 55.)

The reply concluded by reiterating the allegations of unconstitutionality of the Act, as set out in the amended bill of complaint.

It was upon the foregoing issues that the trial was had and upon which the District Court made its findings and

judgment, granting the injunction as prayed for by the respondent and from which an appeal was prosecuted to the Circuit Court of Appeals for the Tenth Circuit by both petitioners herein, by which court the decision of the District Court was affirmed, 95 Fed. (2d) 911.[1]

[1] While the Trial Court rendered no written opinion, he did, both during the trial and at its conclusion, state his views regarding the case. (R. 70, 72, 147, 148.)

THE EVIDENCE

Neither of the petitioners introduced any evidence before the court as to the status of respondent as to being or not being an interurban railroad (R. 146), so that its status as such must be determined solely from the evidence introduced in behalf of the respondent.

The location of the line of railroad of the respondent is shown by the map which was introduced as Exhibit 1 (R. 157). It runs from Ogden, Utah, in Weber County through a portion of Weber, Box Elder and Cache Counties, over the state line into Preston, Franklin County, Idaho, its length being approximately 95 miles. It has two branches, one extending west and south from Lewiston, Utah, to Quinny and Thain, a distance of approximately twelve miles, and the other from Harrisville, in Weber County, Utah, to Plain City and Warren, a distance of approximately eight miles. The line extends from the middle of the block between Grant and Lincoln Avenues and Twenty-third and Twenty-fourth Streets—the block in which the Postoffice building is located in Ogden, which is the second largest city in Utah, along Lincoln Avenue, which is one of the principal streets of the city, to the next town, which is Willard, where it also occupies a public street for a distance of approximately one mile, thence to the next city, which is Brigham City, where it again runs along a public street for a distance of approximately four miles, thence to Honeyville, a small town, where it is on one of the two streets of that town. It thus serves the northern portion of the Salt Lake Valley. After leaving that town, the line extends over what is known as the Collinston divide into Cache Valley, which that divide separates from the Salt Lake Valley, and enters Mendon, traverses there a public street throughout the city limits, thence to the next town, which is Wellsville,

enters that town on a public street, makes a sharp right a turn thereon, and then proceeds along the main street of town for the entire length of that street. The next tow Hyrum, where the line occupies a public street for the e length of its line therein. Thence it proceeds to Milly where it again occupies a public street between the town's its. The same is true of the next town, Providence. Lo the fourth largest city in Utah, is the next town reached there the line occupies the main paved business street and residential extensions between the city limits. The s is true of the next city, Smithfield. Thence it proceed the next city, Richmond, where it occupies a public street its entire length, this street being two blocks from the m street. Lewiston, the next town, is the only city or town on line which is entered by a private right of way, although e there the track occupies a public street for a short dista The line then enters Idaho, only because the Cache Va extends beyond the state limits, and proceeds in Idaho a tance of about six miles to its northern terminus, the city Preston, where it occupies the main paved street to the of the line. (R. 79-80, 268.)

In all of the cities, the respondent in its operation is s ject to speed limit regulations of from twelve to fifteen m per hour; in Logan along the main paved street being twe and it is likewise subject to the general traffic stop-and signals there, and in Smithfield the same as other vehic using the streets. (R. 80-81.)

The respondent also operates a bus line from Og to Preston, paralleling the rail line upon which the freight passenger trains move, except that instead of going o the Collinston divide it proceeds on the main highway ea ward from Brigham City through the Sardine canyon, to Cache Valley. (R. 81.)

The respondent also operates a local urban bus line Logan City, which, in addition to serving the residents of city, transports students to and from the State Agricultu College, which is located there, as well as its supplies. (R. 82.)

Respondent's line substantially parallels the Oregon Sh Line Railroad to the Collinston divide, except that the Sh

Line does not occupy any city or town streets, but that railroad thence proceeds northward to Cache Junction, from which a branch line parallels respondent's line through the Cache Valley to Preston. The Oregon Short Line formerly entered Cache Valley over the Collinston divide, as does the respondent's line now, but that line was abandoned by the Short Line because it was not adaptable to steam line operation, because of its heavy grades and sharp curvatures. (R. 82.)

In all the cities and towns through which the line passes, the respondent of course had to obtain franchises, as well as from the counties in which highways are occupied. All of these franchises require it to use a motive power other than steam, and some authorize it only to operate as a "street and interurban," or 'interurban or street railway." (R. 84, Exhibit 2, R. 158, 269-271.) 18.2 per cent of respondent's line is on public highways or city or town streets, but within the limits of towns and cities, except through Lewiston, where almost one hundred per cent is on the city's streets, and with the exception of Lewiston, it is only outside of towns and cities that a private right of way is used. In other words, a private right of way is used only to reach cities and towns, so as to prevent the line being any more circuitous than practicable, but one they are reached, then the public streets are used, but no matter how circuitous, the line was so constructed as to reach every city and town in the valley. (R. 90; Exhibit 10, R. 169; Exhibit 11 Com., R. 286.) [2]

The respondent has interchanges with the Bamberger Electric line at Ogden with the Denver and Rio Grande Western Railroad at Ogden and with the Oregon Short Line Railroad at several points (R. 49), and has joint tariffs with substantially all the railroads of the country (R. 141), but sells no

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[2] The numbers of the Exhibits from 7 to 25 introduced before the commission are one less than those introduced before the Court, and in the references herein the Exhibits introduced before the Commission are indicated by the symbol "Com." Exhibit 26 before the Commission was not introduced in evidence in the trial before the Court by respondent as part of its case in chief, but only became a part of the record before the Court because it was introduced by respondent in rebuttal, together with all of the record before the Commission.

interchange passenger tickets except between it and its connecting electric line (R. 95, 296, 312). It never acts as a "bridge carrier" between other lines of railroad, but either as an originating as well as a delivery carrier, or as an originating or delivery carrier (R. 93, Exhibit 1, R. 157, R. 313). It makes no discrimination as to which of the steam lines to which freight is delivered, that being determined by the shipper. (R. 93).

The history of the development of respondent's line is typical of practically all interurbans, namely, the extension of street car systems and the connecting of small interurbans. The evidence discloses that history of the building of the line to be as follows (R. 158-161):

> "The present Utah Idaho Central Railroad Company is the result of the combination and extension of several small street car and interurban properties.
>
> It had its inception in Ogden, Utah, about 1890, from a street car system, approximately three or four miles long, upon which were operated some horse drawn cars. This company eventually became insolvent and when liquidated its assets were purchased by a group of Northern Utah citizens, headed by the late David Eccles, who organized a corporation under the laws of Utah, which was known as the Ogden Rapid Transit Company. This change took place in the late nineties and thereafter marked the beginning of the rehabilitation, electrification and further expansion of the properties which are known today as Utah Rapid Transit Company, located within the corporate limits of Ogden City, and The Utah Idaho Central Railroad Company, the interurban line in question.
>
> Sometime in the late nineties, a corporation was formed under the name of the Ogden and Northwestern Railroad Company, which built a small interurban line of railroad from the north city limits of Ogden along the country roads to Hot Springs in Box Elder County, and operated thereon for passenger and some freight business, their initial power being furnished by a small steam locomotive.
>
> The rails of this new company connected at the north city limits of Ogden with the rails of the Ogden

Rapid Transit Company on Washington Avenue, the two companies jointly handling interurban traffic.

Subsequently the same interests who owned or held control of the Ogden Rapid Transit Company acquired the ownership of the Ogden and Northwestern Railroad Company and from that time on operated common equipment over both properties.

Approximately in the year 1910, the Ogden Rapid Transit Company as a corporation acquired the property of the Ogden and Northwestern Railroad Company and equipped the latter company for an electric interurban operation and also extended the line along the public highway from Ogden Hot Springs to Brigham City, Utah, which is located twenty-one miles north of Ogden, operating electrically over the entire line for the transportation of passengers and freight.

Contemporaneously with this development between Ogden and Brigham City, practically the same people who owned the Ogden Rapid Transit Company built a line of street and interurban railway in the City of Logan, Cache County, extending same northward through Hyde Park to Smithfield, Utah, a distance of about eight miles, and south through Providence, Millville and Hyrum to Wellsville, Utah, a distance of approximately twelve miles, operating over this interurban by means of electrical power and handling passenger and freight business, the freight business being largely agricultural products produced in the vicinity of their line of railroad.

About the month of May, 1914, the Ogden Rapid Transit Company operating in Ogden City and from Ogden, Utah, to Brigham, Utah, and the Logan Rapid Transit Company, operating in Logan City and between Wellsville, Utah, and Smithfield, Utah, were consolidated into a single corporation under the laws of the State of Utah, known as the Ogden Logan and Idaho Railway Company.

This corporation for a time thereafter operated all of the properties formerly owned and controlled

by the Ogden Rapid Transit Company and the Logan Rapid Transit Company, and also commencing about the time of the consolidation rebuilt a portion of the line extending from Ogden northward through Brigham City and constructed a new line from Brigham City north over the Collinston divide into Cache Valley connecting with the southern terminus of the Logan Rapid Transit Company; also extending the northern terminus from Smithfield, Utah, to Lewiston, Utah, a distance of eleven miles, and eventually crossing the state line to Preston, Idaho, which lies approximately six miles north of the Utah state line.

The Ogden Logan and Idaho Railway Company continued thereafter to operate the street car system in the City of Ogden, the street car system in the City of Logan, and also the interurban line which had been developed out of the interurban properties of the Ogden Rapid Transit Company and the Logan Rapid Transit Company, continuing to carry on the same general character of business of transporting both passengers and freight with electric cars.

In the latter part of 1919, it seemed desirable to segregate the interurban operations of the company from the purely local street car operations in the City of Ogden and the suburban operations extending east from Ogden City into Ogden Canyon. Accordingly a new corporation was formed known as the Utah Rapid Transit Company, which took over and operated the local street car system in Ogden, Utah, and the suburban line running east from Ogden into Ogden Canyon, the ownership and operation of the interurban railroad from Ogden, Utah, to Preston, Idaho, remaining with the Ogden Logan and Idaho Railway Company, which had changed its name to Utah Idaho Central Railroad Company.

Utah Idaho Central Railroad Company, a Utah corporation, continued to operate these interurban lines until the latter part of the year 1926, when a corporate reorganization took place and the properties were then continued under the ownership and operation

of The Utah Idaho Central Railroad Company, a Delaware corporation, which is the present owner and operating company.

Throughout all of these developments of this interurban property through the various companies previously named, the personnel of its employes and owners has to a very large extent remained that of the original street car and interurban companies, namely, the Ogden Rapid Transit Company and the Logan Rapid Transit Company."

The purpose and method of operation of the line was then shown in a general way, followed by evidence in detail as to its various phases as follows. (R. 161-163.):

"As indicated in the history of the corporate development of The Utah Idaho Central Railroad Company, the property as it now exists was practically completed in the latter part of the year 1915 and represents as previously explained the joining together of individual small interurban railroads previously constructed in Cache Valley and in Weber and Box Elder Counties.

These roads were practically entirely financed by local citizens in the Northern Utah area who were collectively interested in the various agricultural and agricultural manufacturing pursuits which are common to this section, such as dairying and milk processing; sugar beet raising and sugar manufacturing; canning; livestock; poultry; fruits; vegetables, etc.

These people were naturally also interested in the economic, cultural and educational development of the various small communities which are now contiguous to the interurban railroad. Their idea in the construction of the constituent properties and in the later joining together of these properties into one line was to furnish an easy convenient method of intercourse between those communities and also to furnish a method of transporting the raw products grown in the area to the agricultural processing and manufacturing plants which they developed within the area.

This requirement could be best and most satisfactorily served by the construction of an interurban electric line with its consequent frequent and rapid passenger service and its natural ability, by reason of its type, to provide a convenient and economical method of moving raw products at frequent intervals, and over short distances to the processing plants.

This type of service was and is distinctly within the physical scope of an interurban railroad in that, as will be later shown, its entire physical construction was designed to accommodate small trains, rapidly moving, at frequent intervals, and it is a character of service not possible of being furnished by the ordinary steam railroad, in that a major requirement of steam railroad operation is long trains and a service largely influenced as to schedule by the availability of sufficient tonnage to approximate the rating of the power used. The continual development in steam transportation of larger power with its consequent longer trains and longer intervals between those trains creates a physical condition which cannot be adapted to the type of service performed by an interurban railroad.

To illustrate this point, such services as the following have been performed by The Utah Idaho Central Railroad Company. The handling of raw milk from concentration points to condenseries. This service must be performed with a minimum of time enroute and a definite arriving time at the condensery to fit in with their daily evaporation program. This movement is generally accomplished with the power unit and one car and usually entails special service.

This company has also performed a service of moving shelled peas, from vineries to canning factories. In the canning of peas, it is necessary in order to preserve their natural flavor that a minimum amount of time be consumed from the field to the cannery, peas being harvested in the fields, taken to the vinery for shelling, and moving in lug boxes rapidly into the cannery before either time or temperature can start the change in flavor. This movement likewise is accom-

plished with one or two car trains and special service.

Another typical interurban movement is the handling of ripe tomatoes in stock cars for movement into the canning factory, usually with special service.

Large quantities of beets are handled from various loading stations in small trains to the sugar factories for processing.

These are only typical of the type of service performed and generally represent the transportation link of the industrial development contemplated as a unit by the same people who constructed the processing plants at the same time they constructed this interurban railroad.

The number of trains operated daily on this property, which will be later herein shown, in itself presents a more concrete picture of the frequency of service actually used in the operation of the property.

Likewise, there will be shown, the large number of sidings and spurs available for the loading of raw products and also there will be shown the frequency of available passenger stops for the convenience of short distance interurban travel.

The company at the present time in addition to the operation of numerous small freight trains operates both one and two car interurban passenger trains and gasoline motor busses.

A distinctive feature in the interurban passenger operation, which tends to illustrate the type of service furnished the communities involved, is the transportation of school children. The providing of educational facilities in this section is through the location of high schools at central points rather than in each community and, in the carrying out of this policy, at public expense students are brought from their homes to these centrally located schools.

For many years pick-up and delivery service has been rendered at all available points in connection with package freight. A daily package merchandise train

is operated making a round trip from Preston, Idaho, and return during the night hours.

This train is powered by an interurban electric car constructed so as to make a large portion of the car available for the handling of package freight, each car also being equipped with refrigeration facilities for the handling of perishable commodities in summer weather and with heating facilities for their handling during the winter weather. The locomotive unit of this train is likewise sufficiently powered to permit the hauling of other cars of package freight."

It is significant that there was in existence at the time of the construction of this line a steam railroad, which the respondent's line closely paralleled (R. 28.) The conclusion is irresistible that the service rendered by the ordinary steam railroad did not meet the transportation needs of the territory served, and the reason it did not meet those needs was two-fold. It was not designed to and did not provide rapidly moving trains, stopping at frequent intervals for the transportation of the public, especially the school children, as above stated, and as will later be more fully shown. It did not furnish the facilities for the gathering of the products of the soil of this purely agricultural territory and the transportation to the steam railroads of those products which could reach the outside markets without processing, and what is far more important, because it involves the greater part of the agricultural products of the territory, their gathering and transportation to the processing plants which, as pointed out, were thereupon located on respondent's line, and after being processed are transported by respondent to steam lines to be carried to the outside markets. If the then-existing steam railroad had met these needs, then respondent's line would never have been built. It was to meet them it was built, and continuously since then has been operated to meet those needs.

Evidence was introduced to show the various phases of the physical construction of the respondent's line and to demonstrate that they are so co-ordinated one with another as to prevent it rendering the type of transportation service which is rendered by the ordinary steam railroad, without a complete transformation and relocation of the line in all its details, but on the contrary to compel the rendering of a type of transpor-

ion service distinct and separate from any other agency of nsportation, whether that of an ordinary steam railroad, a ck line, a bus line, or an airplane line, and the limitations its physical construction impel what has been commonly derstood to be the transportation service of an interurban lroad.

This evidence as to the physical characteristics of the lroad was introduced in the form of Exhibits, which are set t in full in the record, and will be only briefly referred to rein for the purpose of showing that the foregoing conclu-ons are completely sustained by the record.

First, the motive power. The evidence as to that shows at the electric locomotives owned by respondent have a min-mum practical rating, in other words, the tonnage the locomo-ve will pull, of 275 tons, and a maximum of 650 tons on two all sections of the line, with an average of 550 tons, so at the number of loaded freight cars (each of which has a oss weight of 45 tons) which a locomotive will pull between gden and Brigham City is twelve cars, and less on other rts of the line (R. 85; Exhibit 5, R. 164).

Second, the equipment. The evidence with respect to that ows that the respondent owns 173 freight cars, 75 of which e of such construction that they cannot be interchanged th the steam railroads. The remaining 98 are dump cars, own as gondolas, which were purchased by the respondent r the transportation of sugar beets from the dumps estab-hed on respondent's line in the various localities in which ey are raised to the sugar factories. They are so used ring the beet season, and during the remainder of the year ey are used for the hauling of coal from the mines to the dustries located on respondent's lines, and are only inter-anged when lime which originates on respondent's line is ipped to sugar factories off respondent's line, that being e only commodity, other than sugar beets, originating on e line for which such cars are suitable. (R 85-86; R. 141-142, xhibit 6, R. 165.)

Third, the substation equipment. The evidence with re-pect to that shows that the electric power, with which the spondent's line is operated, is purchased by respondent from ne Utah Power & Light Company and delivered by that

company to the substations of the company at high voltage, transformed through the company's generating sets to 1500 volts. These substations are located at Ogden, Hot Springs, Dewey and Smithfield and the equipment of substations is of such a size that it will furnish sufficient power only for the locomotives owned by the company, that is, those capable of hauling twelve cars, and if heavier trains were to be hauled, then they would have to be rebuilt to accommodate locomotives with greater practical rating. (R. 86; Exhibit 7, R. 166).

Fourth, the electrical positive feeder and trolley circuit and negative rail circuit. The evidence as to them shows that they are so limited as to the quantity they can carry, taking into consideration line losses, that they are only sufficient to operate the locomotives with the practical rating capacity of the locomotives owned, so that if locomotives of a greater capacity were to be used, the circuits would have to be replaced (R. 86-88; Exhibit 8, R. 166-167), else the locomotives would be stalled for lack of power.[3]

Fifth, character of track construction. The evidence as to that shows that the track is constructed of light rails, the heaviest, except for a distance of two miles in the paved street in Smithfield, being 70 pounds, as contradistinguished from an average of 100 pounds on steam lines. The ties on which the rails rest are 6-8 inches, as contradistinguished from steam line rail construction, in which the ties used are not less than 7 by 9 inches, and generally 10 inches. The respondent uses a tie six feet in length, whereas the steam roads use a seven foot length, the different tie and rail construction being required by the heavier loads imposed upon them. Only eleven miles are tie plated, a tie plate being a square piece of metal between the rail and the tie, in order to form a wider base for the rail to rest on, and thus relieve the stress, whereas all the main steam lines and practically all their branches are tie plated (R. 88-89; Exhibit 9, R. 168; Exhibit 8 Com., R. 284).

Sixth, car capacity of spur and passing tracks. The evidence as to them shows that the average length of the respondent's passing tracks will accommodate 16 cars, whereas the

[3] This exhibit was not introduced before the Commission, but is purely cumulative, being another physical characteristic, which, along with all the others, would have to be changed to permit any such train operation as is typical on steam lines.

erage length of the passing tracks on the steam roads is om 75 to 150. It also shows that there are 34 spurs or ssing tracks on respondent's main line, and eleven on the anch lines, averaging approximately three miles apart on e main line and two miles apart on branch lines. (R. 90; hibit 10, R. 169; Exhibit 9 Com., R. 285-286.)

Seventh, the curvature of the turnouts to the yard facili-s and the industries on the line. The evidence as to them ows that the curvatures on the turnouts are so restricted at neither ordinary steam locomotives nor steam passenger rs can be operated over them; and over some of them the rger freight cars can only be taken when they are taken one a time. (R. 90; Exhibit 12, which shows in detail the curva-res on the main line and sidings, and the turnouts, sidings d spurs. R. 171-195; Exhibit 11 Com., R. 281-288). Re-ondent's equipment is so designed that it can be operated such a track. For instance its locomotives are only 35 t long with a 16 foot distance from truck center to truck nter (R. 90).

Eighth, the grades. The evidence as to them shows that ere are on the main line of the respondent's line 75 or 80 ade breaks, that is points at which the percentage of grade, the up hill or down hill changes; in other words, that the e follows the contour of the country ordinarily, with no at-mpt to change the grades by cuts and fills, with the result at there are on the line what would be considered excessive ades for a steam line. The maximum is 4.77. It is indeed gnificant in this respect that as already pointed out, the e is built over the Collinston divide, formerly used by the egon Short Line, and which was abandoned by that railroad d its road reconstructed to avoid the grades and curvature er that hill. (R. 93; Exhibit 13, R. 196-199; Exhibit 12 Com., 292-293.)

By means of a profile map of respondent's road as it is nstructed in ten mile areas, with the factory rating and prac-al rating of the locomotives imposed thereon, there is shown e combined effect of the road's physical construction and cilities upon the operation of its trains. As an example, the rst sheet of Exhibit 14 shows the first ten miles from Ogden, th 13 grade breaks in that section. Over it the respondent

can haul a train of twelve loaded cars northbound and fourteen cars southbound. The second sheet shows that over the next ten mile sector only twelve loaded cars can be hauled. However, trains have to be spaced so that two trains are not pulling on the power in a particular sector at the same time. So on with the other sectors, except those shown on sheets 5 and 6 over the Collinston divide. Going north or south over the divide, a train of only eight loaded cars can be operated, but the distance for which that limitation exists is a little greater going north, which is approximately eight miles, than south, which is six miles.

This situation limits the entire operation, so that if a train leaves Ogden with twelve cars and four of them are not out of the train when it reaches Dewey by reason of being destined to intervening points, it is necessary to divide the train to enable it to go over the divide. The same is true of southbound trains. (R. 94; Exhibit 14, R. 200-208; Exhibit 13 Com., R. 293-294.)

Thus it is shown by the evidence that not many, as admitted by counsel for petitioners, but all of the physical characteristics of respondent's railroad are those of an interurban railroad. Moreover, that they are all correlated and tied together, so as to make necessary a particular type of transportation, which is interurban in character, that is, short, light trains operated at high speed, at frequent intervals, and making frequent stops along the line, both in the carriage of passengers and freight. In other words, that such a type of operation is not made necessary by only one of those physical characteristics, but by all of them operating uniformly as limiting factors, so that a change in one of them would not make possible a change in operation, but all would have to be changed, and substantially to the same extent; that the limitations of motive power, electric power at the substations and through the wires, the character of equipment, the length of sidings, the construction of the track as to rails, ties, etc., its grades, the curvatures thereof and of the turnouts, and the operation upon the public highways and city streets all impose upon the respondent the same limitation of operation as above outlined If the respondent desired to increase its tonnage, it would have to operate additional trains, not longer trains (R. 88). On the contrary, the type of operation of the

ordinary steam railroad is entirely different. Upon them the track construction is of heavy rails, of large ties, tie plated, capable of standing heavy loads, with motive power capable of hauling heavy tonnage, with grades and curvatures held to a minimum, permitting the operation of long and heavy trains moving at intervals fixed by the necessity of obtaining sufficient tonnage to warrant the use of the motive power, and making infrequent stops (R. 88).

The evidence, in a series of statistical exhibits, shows that, as compelled by its physical characteristics, the actual operation of the railroad is in fact of the interurban type.

Exhibit 15 shows from the years 1932 to 1935, inclusive, by months, the number of passenger trains, passenger busses and freight trains operated over the line and the average daily number. In brief, it shows that during the year 1932 there was an average of 9.7 passenger trains per day, 4.1 passenger busses and 6.6 freight trains. In the year 1933, the average number of passenger trains was 11, passenger busses 5.6, freight trains 7.7. In 1934, the average was 11.5 passenger trains, 4.1 busses and 7.7 freight trains. In the year 1935, the average was 9.6 passenger trains, 4.2 busses and 7.8 freight trains. (R. 96-97; Exhibit 15, R. 209-210; Exhibit 14 Com., R. 294-295.)

The petitioners in their brief seek to minimize the difference between the length of trains on respondent's line by calculating the number of cars moved per day by respondent from the number of cars moved per train and the number of trains moved per day. Taking the figures for 1934, they say correctly that respondent operated an average of 11.5 passenger trains per day of 1.1 cars each, and an average of 7.7 freight trains per day of 6.2 cars each, which would mean 12.7 passenger cars per day and 47.7 freight cars per day. This calculation, however, but serves to emphasize more clearly the difference between operations on respondent's line and upon a steam railroad operating in the same territory. On the Union Pacific Railroad, the average length of a passenger train in the year 1934 was 10.8 cars and the average length of a freight train was 63 cars. (Exhibit 20, R. 216.) In other words, the amount of one day's passenger business on respondent's line is almost all handled by one

train on the Union Pacific and all the freight business done by the respondent is handled on less than the average freight train on the Union Pacific. Now, if the operation upon respondent's line is compared with the operation upon the electrified portion of a steam railroad, such as the Chicago, Milwaukee, St. Paul and Pacific Railroad, the results are substantially the same. There were no statistics introduced for the year 1934, but in the year 1933 the average length of a passenger train upon the electrified portion of that road was 10.9 cars and the average length of a freight train was 54.2 cars; in other words, the operation upon respondent's line is entirely distinct from the operation upon a steam line, even though electrical motive power is used by the latter on a portion of its line, and this difference is the necessary result of the different characteristics of the lines, other than the mere matter of motive power used.

Passenger trains are operated on a regular daily schedule, (R. 138; Exhibit 42, R. 243-245).[4] Freight trains are operated as special or "extra" trains on orders as needed to accommodate the traffic (R. 96).

The respondent operates a daily merchandise train for the handling of less than carload freight, which is powered by a passenger car with the windows boarded up and the passenger carrying space used for the handling of package freight. Perishables in the summer time are handled on this train in a specially constructed refrigerator box, and in the winter the car is heated to protect shipments affected by extreme cold. A pick-up and delivery service is rendered as to all shipments in less than carload lots. The daily merchandise train is operated so that the shipper in Ogden, or in Salt Lake City (the train being operated in connection with the Bamberger Electric Railroad, an interurban operating between Salt Lake and Ogden) can every working day in the year have the railroad's truck call at his place of business at any time before closing time for any merchandise he desires to ship on respondent's line and the same will be delivered to the consignee at any point on the line at the opening of business the following morning. A similar reverse service is given by these railroads southward. The freight that is thus moved consists

[4] This Exhibit was not introduced before the Commission.

all types of merchandise shipped by wholesalers in Salt
ke and Ogden to consignees on respondent's line, Southward
m the farms and processing plants, the agricultural prod-
ts are shipped to the markets in Salt Lake and Ogden.
96-97; Exhibit 15, R. 278, 279.)

Exhibit 16 is a list of the passenger stations on respond-
t's line, showing the distances between stations, whether
ey are agency stations or not, the populations of the cities
towns where stops are made, except that where no popula-
n is shown it is a country road stop. In brief, in the 107
les of main line and the Plain City branch, there are 73
ssenger stops, or approximately a stop every mile and a
lf, practically at every cross road. In every city or town
ere is an agency station and outside them the passenger
lks down the country road to the stopping place and flags
e train. In many of them the respondent has built a shelter
a protection against wind and rain. In the cities and
wns (other than the station at Ogden), the train stops in
e middle of the street, and the passenger walks out and
ards the train as he would a street car. In fact, the pas-
nger service rendered by the respondent, as is the case gen-
ally with interurbans, is but an extension of a street car
stem to the country. The stops are made at the cross roads,
cause they are the concentration points of the areas of
pulation. (R. 97-99; Exhibit 16, R. 211-213; Exhibit 15
om., R. 295, 296.)

Exhibit 17 shows for the five year period 1931 to 1935,
clusive, the number of passengers handled, the amount of
assenger revenue, and the average fare per passenger. In
e year 1931, the line handled 489,000 passengers, at an
verage fare of 18.3 cents. In 1932, 407,000 passengers, at
n average fare of 16.5 cents. In 1933, 366,000 passengers,
an average fare of 16.8 cents; in 1934, 408,000 passengers,
an average fare of 15 cents and in 1935, 400,000 passengers,
an average fare of 16.1 cents. This demonstrates that
e service rendered is but an extended street car service;
other words, the closely spaced passenger stops are being
sed to travel from one community to another, or to and
om the larger communities to work, which is a character-
tic interurban service. (R. 99; Exhibit 17, R. 213-214;
xhibit 16 Com., R. 296).

Exhibit 18 classifies the passengers handled during the same five year period between regular passengers and school children. The school children in Cache Valley are transported at public expense to centrally located schools. For example, there are only two county high schools in the county, both of which have been located on respondent's line, and the students are picked up at the various stops on respondent's line and transported to and from these schools on special trains operated for that purpose at extremely low fares. The Exhibit shows that in 1935, out of a total of 400,000 passengers carried, 185,000, or a little less than half, were school children carried on special school trains and there was substantially the same percentage in other years. (R. 99-100; Exhibit 18, R. 214; Exhibit 17 Com., R. 296-297.)

The foregoing exhibits prove that the actual operation of respondent's line is, as not only would be expected, but made necessary by its physical makeup, not the operation of an ordinary steam railroad, but also prove that notwithstanding the limitations imposed by its type of construction, which would prevent it rendering the type of service rendered by an ordinary steam railroad, nevertheless they suffice to permit respondent to render the public that type of interurban service which meets the needs of the public it serves.

By a comparison made with all the steam railroads operating into Utah, the evidence further emphasizes the difference between their physical construction and operation and that of respondent. Thus Exhibit 19 shows the list of sidings for a distance of 200 miles from Ogden on the Los Angeles and Salt Lake Railroad, the Southern Pacific Railroad, the Oregon Short Line Railroad, the Union Pacific Railroad, and the Denver and Rio Grande Western Railroad. It will be recalled that an exhibit of this character introduced for the respondent showed the average length of sidings for the accomodation of trains to be 16 cars. Exhibit No. 19 shows for the Los Angeles Railroad that the average length of all its sidings in this 200 mile stretch is 87 cars, or between five and six times the length of respondent's; for the Southern Pacific, the average length is 114 cars, or between seven and eight times the length of respondent's; for the Oregon Short Line, the average length is 86 cars, or between five and six times the length of respondent's; for the Union Pacific, the

ge length is 109 cars, or about seven times the length spondent's; for the Denver and Rio Grande, the average is 36 cars, or between five and six times the length of ndent's. (R. 101; Exhibit 19, R. 215; Exhibit 18, Com., 7.)

The increased length of sidings on steam road tracks accommodate long steam road trains. For the same n, the restricted length of respondent's is to accomte short interurban trains. The number of sidings on the two hundred miles of the Los Angeles Railroad is 35. same is true of other steam roads. On the 95 miles spondent's line, there are practically that number, in the mileage. In fact, there are loading facilities every or four miles on respondent's line, available to the er to load his products for the market or processing s. The farmer does not have to wait for the train to along, as in the case of the ordinary commercial steam oad, and have the train load it. The respondent spots opriate cars at each of these sidings to be used by the er in loading his products. The principal movement is rload lots, and those which are not are concentrated at ey stations which are located on the respondent's line six or seven miles apart. (R. 98.) In Logan there is oling room built into the freight house, and in Brigham a refrigerator compartment. These permit the farmer ing in perishable commodities in advance of train time, them, and leave them at the station to be loaded onto rain. (R. 98.)

The comparison of passenger stops would be much more of line. Passenger stops on respondent's line average t every mile and a half; on the average steam railroad, will not average one in twenty miles. In this western try, there are distances as high as forty or fifty miles een steam railroad passenger stops. (R. 101; Exhibit R. 215; Exhibit 18 Com., R. 297.)

Exhibit 20 makes a comparison between the operating its upon the steam lines coming into Utah and the results respondent's line, with the consequent operating costs mile, that is, the cost of labor for each car moved. It shows in 1935 the average length of passenger trains on the

Union Pacific was 10.7 cars, with an average cost for tra
men's service of 2.86 cents per car mile; on the Oregon Sh
Line, the average length of such trains was 8.6 cars a
average cost 3.75 cents per car mile; on the Los Ange
and Salt Lake, the average length of such trains was 1
cars and average cost 3.22 cents per car mile; on the Southe
Pacific, the average length of such trains was 10.3 cars a
the average cost 3.32 cents per car mile; on the Denv
and Rio Grande, the average length of such trains was
cars and the average cost 3.89 cents per car mile. On t
respondent's line, the average length of passenger trai
was 1.1 cars and the average cost 4.9 cents per car mi
in other words, taking the Union Pacific as an example, t
trains on respondent's line are one-tenth as long and t
trainmen's cost per mile almost double. The comparis
in other years shows similar results. (R. 101-103; Exhib
20, R. 216-222; Exhibit 19 Com., R. 297-302.)

It shows that for the year 1935, the average length
a freight train on the Union Pacific was 60 cars; the avera
cost for trainmen's service was .65 of a cent per car mi
On the Oregon Short Line, the average length of such trai
was 48 cars, its cost 1.01 cents per car mile. For the L
Angeles and Salt Lake, the average length of such trai
was 48.3 cars, average cost 1.21 cents per car mile. For th
Southern Pacific, the average length of such trains was 56
cars, average cost 1.08 cents per car mile. For the Denv
and Rio Grande, the average length of such trains was 42
cars, average cost 1.28 cents per car mile. For the respon
ent, the average freight train length was only 6.5 car
average cost 2.5 cents per car mile. As compared with th
Union Pacific, respondent's train length is approximatel
one-tenth, and respondent's labor cost for transporting eac
car one mile was about four times greater. (R. 102; Exhib
20, R. 216-222; Exhibit 19 Com., R. 297-302.)

An even more pertinent comparison is made in Exhib
21 between the operating results on respondent's line an
on a steam railroad which operates a portion of its line b
power other than steam. This is undoubtedly the type
railroad the Congress had in mind when in Section 1, Firs
of the Railway Labor Act it provided that "any part of th
general steam railroad system of transportation now or here

after operated by any other motive power," should not be excluded from the Act. Such a railroad is the Chicago, Milwaukee and St. Paul Railroad, a western railroad, a considerable portion of which has been electrified, namely, four or five hundred miles through Montana and east and west thereof. That road where electrified uses very large electric locomotives, with self generating features, about ten times as large as those used on respondent's line, with very heavy transmission lines, and so in Exhibit 21 the comparison is made between respondent's line and that railroad. It shows that the average length of passenger trains on that portion of the railroad operated by steam was six cars, with an operating cost per car mile of 4.82 cents, whereas on the portion electrified it was 10.1 cars and the cost per car mile 3.08 cents. The average length of freight trains on the steam portion was 45.8 cars and the cost per car mile was 1.16 cents, whereas on the electrified portion the average length of trains was 72.6 cars and the cost per car mile 3.08 cents. This clearly shows that where there can be an electrical operation under the same conditions as a steam operation, the railroad is capable of hauling as heavy or heavier trains, and it is even more efficient and less costly.

The situation, however, is entirely different, where, as on respondent's line, or the ordinary interurban railroad, the size of trains is limited by its physical characteristics, with consequently greatly increased cost of operation. (R. 104; Exhibit 21, R. 222-223; Exhibit 20 Com., R. 303-304.)

The facts brought out in Exhibits 20 and 21, and the differences between the operations of freight and passenger trains on steam lines and lines in part electrified, and the operation of trains on respondent's line, are more pointedly shown by the graphs, which constitute Exhibits 22, 23, 24 and 25. (R. 224-227; Exhibits 21, 22, 23 and 24 Com., R. 303-306.)

Some criticism has been made of these comparisons in the hearing before the Commission, because it was there claimed that the comparison should be made between respondent's line and steam lines of similar length, or with the branch lines of the larger railroads. However, no such evidence was introduced at the trial, or at the hearing before the Commission, and inasmuch as petitioners knew of this omission, and

made no effort to introduce such evidence, it cannot no
assumed that such comparison would show any substa
difference, because the record shows that there are the
differences between interurban branches and branche
steam lines as there are between interurban main lines
the main steam lines. (R. 305.)

The Exhibits and the testimony respecting them b
out forcibly the difference in labor conditions on resp
ent's line and on the steam railroads. Because of the
trains operated on steam railroads, a larger crew is requi
and a different type of ability and experience, also
dangers are greater, and because steam trains are oper
long distances the crews are required to be separated f
their homes for long periods. On steam railroads, the c
consists of five men on passenger trains and six on fre
trains, whereas on respondent's line on passenger trai
maximum of only two is required, and on freight trai
maximum of four is required, and on trains operated b
power unit and one car, only two men are required. (R. 1
The pay by reason of the foregoing differences is less
respondent's line than on steam lines. (R. 106.)

The difference is also illustrated by the fact that si
1909 the employes of respondent have been unionized,
they did not belong to any of the steam railroad unio
commonly called the Big Brotherhoods, but were memb
of the Amalgamated Association of Street and Electric R
ployes of America, an affiliate of the American Federat
of Labor, and continuously since 1909 up to June 1, 19
by written agreements from time to time renewed betw
the respondent and that union, the rates of pay and con
tions of labor have been fixed. Never during that ent
period has there been a strike or a threat of a strike, a
the amicable relations between the respondent and its e
ployes were not disturbed until after the passage of t
Railway Labor Act, when an attempt was made by t
Brotherhood of Railway Trainmen (one of the Big Broth
hoods), to organize the employes into that union, for t
purpose of imposing upon the respondent the rates of p
and conditions of employment prevailing on steam railroa
and to that end forcing the respondent to comply with t

Railway Labor Act. (R. 106-109, 110; Exhibits 27, 27-1, 27-2 and 27-3, R. 230-321.) [5]

It is shown that not only is there a difference in rates of pay on respondent's line, but in method of pay. On steam railroads, the employes are paid on a basis of an eight-hour day, whereas on respondent's line they are paid on an hourly basis. The effect of this difference is shown by an illustration (R. 132):

A trainman is called in Preston, Idaho, respondent's northern terminus, to bring a passenger train to Ogden, Utah. That would consume three hours' actual running time. If the steam railroad method were used, respondent would be required to pay him for an eight hour day. After he arrives in Ogden, and it is assumed respondent finds it necessary to send him to Plain City, a point about ten or twelve miles from Ogden, for a car of potatoes, which would consume 45 minutes, the respondent would be required to pay him the eight-hour day minimum first for the run from Preston to Ogden, and would be required to pay him time and a half for not less than four hours, in addition to the pay for a day for three hours' work. (R. 132-138.)

Obviously the Congress recognized these differences when it exempted the interurban railroads from the operation of the Railway Labor Act, to prevent the undue hardship they would suffer if the standards of pay and conditions of employment applicable to steam railroads were applied to them.

The respondent then introduced in evidence the order of the Director General of Railroads, that it was never subject to Federal control (R. 109, 110; Exhibit 26, R. 228; Exhibit 25 Com., R. 306). Obviously, as was stated before the Commission, "because it was essentially an interurban railroad, and was not a part of the general steam railroad system of transportation, the preservation of which the government felt to be necessary in order to advance its military activities." It was also shown that the Interstate Commerce Commission classified the respondent as an interurban railroad in its

[5] Exhibit 27 is so numbered both before the Commission and before the Court.

decision in the *Electric Railway Mail Pay Cases*, 58 *I. C. C.* 455, 98 *I. C. C.* 737. It was also shown that the Interstate Commerce Commission recognized that the respondent did not come within the provisions of Section 20 (a) of the Transportation Act. The respondent, upon reorganization after it came out of receivership in 1926, issued 20,000 shares of non-par value common stock and $2,000,000.00 in first mortgage bonds. These issues were reported to the Interstate Commerce Commission in its annual report for the year ending December 31, 1926, (R. 111-112). Subsequently the Interstate Commerce Commission requested further information respecting the issuance of these securities (R. 113-114). The additional information requested was forwarded, in which the issuance of the securities was fully explained (R. 115-116), and yet the Commission never made any objection to their issuance (R. 117). The respondent, it was shown, also accounts to the Interstate Commerce Commission in the manner prescribed for electric railways, rather than in the way prescribed for steam railroads, (R. 117-119). It was also shown that the Railroad Labor Board (constituted under the Transportation Act of 1920, in Title III), which Act contained a provision excepting interurban railways not operating as a part of a general steam-railroad system of transportation, held that railroads of the type of respondent were excepted from the Act, and at no time was the respondent required to comply with the provisions of that Act. (Decision No. 33, Docket 26 A.)

The only other evidence introduced at the trial before the Commission as to respondent's characteristics and its operation were statements as to its revenue. The gross revenue in 1935 was $514,000.00. The average annual gross revenue over a period of twenty years,[6] which is the period during which it has been in actual operation, is $697,000.00 per year, so that the decrease in the year 1935 over the average was $183,000.00. The average annual operating revenue during the period from passenger operations was $217,000.00. The passenger revenue in 1935 was $64,000.00. The average annual freight revenue was $404,000.00. The 1935 freight revenue was $403,000.00, or within one thousand dollars of the average during the period of the road's exist-

[6] In using these statistics petitioners in their brief use only the last ten years. (p. 7.)

ence. During that entire period, there has been no substantial change in the type of freight operation or the revenues produced by it, whereas the passenger revenue in 1935 was $153,000.00 less than the twenty years' average, that reduction accounting for practically all the reduction in the gross revenue. While there has been no change in the character of the railroad, there has been a change or loss in passenger revenue, due to the increased number of automobiles in use and the building of hard surfaced highways parallelling substantially the respondent's line of railroad. There has been no change in respondent's freight operation from the beginning; the only change has been in the number of passenger trains operated. Originally trains were operated out of Ogden every two hours. They have been reduced to eight trains and busses per day. (R. 138-139.) [7]

An analysis of the carloads of freight business during the last six months of 1935, which is representative of the entire period of operations, as set out in Exhibit 28 [8] before the Court and the Commission. (R. 233), shows that the carloads of freight received by the respondent during that period was 4673 cars of which 3843 cars, or 82.2 per cent, originated within the State of Utah and terminated on some point along respondent's line; 2336 of this number, 49.98 per cent, or about one-half, originated upon respondent's line and the balance on the lines of various steam and electric connections. In other words, only 830 cars, or only 17.8 per cent, came from without the state. Of the total of 4673 cars received, 1476 cars were of raw materials to processing plants on respondent's line, 1716 cars were of products used in the processing of agricultural products at plants on respondent's line, and 228 cars were of other types of agricultural products or supplies. The total of these, or 3420 cars out of 4673 cars, were directly tied into agricultural production or processing purely local in character, 812 cars were construction materials

[7] While as already stated, Exhibit 26 before the Commission was not introduced in evidence before the Court the foregoing testimony covers all that was contained in that Exhibit (R. 229, 307-310).

[8] There are two Exhibits No. 28 before the Commission. The first one (R. 232) is not referred to herein. It shows the deficits in net revenue over the four year period, 1930-1935. It is not herein referred to because it has no bearing upon the status of respondent, but was introduced before the Court for the purpose of showing irreparable damage.

and 441 cars of general commodities (R. 139-140), of less th
10 per cent of the cars received were not tied in to t
respondent's peculiarly local service.

During this same period, 4020 cars originated upon r
spondent's line. Of these, 2400, or 59.7 per cent, were d
tined to points within the State of Utah and 1620 cars,
40.3 per cent, were destined to points without the sta
Out of these 4020 cars, 927 cars were raw agricultural pro
ucts going to market, 1408 cars were raw agricultural produ
going to processing plants, sugar beets to the sugar factori
milk to the condensers, etc., 910 cars were processed ag
cultural products going to market, sugar, milk, etc., 3
cars were local products produced on respondent's line a
being destined to the processing plants, such as lime quarri
at points on respondent's line and going to the sugar factori
for use therein, and only 386 cars represent other types
shipment or less than 10 per cent of the cars forwarde
were not tied in to the respondent's peculiarly local service.
This evidence, taken into consideration with the othe
evidence introduced, shows that the freight service rendere
the territory is primarily as much of a local character a
the passenger service furnished the people of the territor
served. This can best be emphasized by concrete example
(R. 140-141.)

The farmer brings his perishables to the stations, wher
cooling facilities are furnished, and leaves them there an
they are then loaded by respondent's employes. (R. 98.)

The farmers of a locality gather together their agricul
tural products which are to be shipped out and bring them t
the cross-roads, where cars are spotted by respondent fo
loading, the sidings of the respondent being located on th
average of approximately every three miles apart (R. 98);
there they are loaded into the cars and respondent at once,
by means of a short train and light locomotive, delivers
them to transcontinental carriers, to be by them carried to
the markets (R. 88).

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[9] The figures given for the last six months' period in 1934 are shown in Exhibit 28. The figures for that period were not introduced at the trial but it is conceded by petitioners in their brief that there was no material difference between the two periods. (Note 21 of brief of petitioners.)

The farmers haul their peas to the vineries, where they are shelled. There they are picked up at frequent intervals, so as to prevent losing their flavor, by small trains of one or two cars each powered by a motored passenger car, and delivered to the canneries (R. 162).

The farmers bring their milk to the cross-roads, where it is picked up by respondent in one-car trains operated at high speed (R. 92), this type of operation being necessary because of the perishable character of the commodity. These trains haul no other commodities (R. 92).

The farmers haul their sugar beets to the beet dumps, where they are loaded into respondent's cars and carried to the sugar factories. The same is true of the lime rock quarried on respondent's line. The type of service rendered is the same whether the condenser or sugar factory is located within or without the state. When processed, these products are then delivered as ordered to the steam lines for shipment to the markets (R. 92, 162).

So much for the freight shipped out; that received consists principally of raw materials and supplies for use by the processing plants located on respondent's line and products to be processed and building materials for those plants. That constitutes the bulk of the shipments in, and together with the shipment of agricultural supplies constitutes all except ten per cent of the shipments moving into the territory. The net result is that of the entire carload business moving in and out during the six months' period, slightly more than 28 per cent moves outside of the State of Utah, and the greater portion of this results from the purely local service furnished by the respondent. This is shown by the fact that of the 8693 cars either originating on respondent's line or destined to a point on respondent's line, only 867, or about ten per cent, can be said to be of shipments not tied into respondent's peculiarly local service, as above set out. The testimony shows that the handling of all these products, except about ten per cent, is in the gathering process of local products of the soil and hauling them either direct to the steam roads in their original form, or after being processed, and that the function performed thereby is no different than such a gathering and hauling by trucks, in other words, a purely local function, which results in the

feeding to the steam roads such traffic as any other local means of transportation would do.

The petitioners, in their brief commencing at page 41 and extending to page 42, claim the figures that respondent has given with reference to the carload business, both forwarded and received, have been distorted, but we submit that they are not subject to that criticism for the reason that the evidence shows without dispute that 8693 cars either originated on respondent's line or were destined to a point thereon. It is true, as petitioners say, that of this number, 2336 come within the classification of both received and forwarded business, because their point of origin, as well as their point of destination, was upon respondent's line. While in our brief in opposition to the granting of the petition for certiorari we loosely spoke of that number of cars being moved, it is obvious from the context that what we meant, and what we now mean, is that 8693 cars was the total number of cars either forwarded or received as shown by the evidence [10] at the trial, and what we said then and what we say now is that less than ten per cent of the number of cars received and forwarded, by which is meant either originating at a point on respondent's line or destined to a point on respondent's line, were not tied in to the peculiarly local service of respondent.

The petitioners also criticize our use of that phrase, and by its use, of course, we did not mean local traffic, that is, traffic confined to respondent's line, but what we meant, and what we mean now, is, as clearly shown by the examples hereinbefore given, that the purpose of the construction of respondent's line was not only to give to the people of the territory it serves a passenger service, but a freight service which was not being rendered by the steam railroad then serving the territory, by encouraging the location upon its line of processing plants for processing of agricultural products of the territory served, the raising of which is the sole industry of that territory, carrying those products to the processing plants from the farm and transporting the processed products to the markets. Now, of course, those processing plants need construction materials for their construction and maintenance, and ancillary to the principal service which respondent renders as above

[10] The evidence (Exhibit 28) is in precisely the form requested by the Representative of the Brotherhood of Railway Trainmen at the hearing before the Commission (R. 310-311).

outlined, it brings those materials to the processing plants. Those processing plants require materials and products in their operation, and these are likewise brought in. The farmer raises raw products which can be marketed without processing, and these are shipped without processing over respondent's line. To carry on his farming the farmer requires machinery and other equipment and supplies, and these are shipped in and delivered by respondent practically at his farm. This is not only the service which has continuously been given by respondent to the territory served, but the agricultural and industrial development of the territory is grounded upon that service, just as the educational and social developments of the people of the territory served is grounded upon the passenger service rendered by the respondent, and it is in that sense that the passenger and freight service rendered by respondent is peculiarly local in character.

Petitioners in their brief, at page 42, do not follow either the exhibit or the evidence in distinguishing between freight in carload lots as received or forwarded, but restrict their analysis to that which actually moved during the period, with the result that of the 8693 cars referred to by respondent as originating from or destined to points on respondent's line only 6357 cars actually moved over respondent's line, because 2336 cars of the total number of cars originating from or destined to points on respondent's line both originated upon its line and were destined to points thereon. Based upon the number of cars actually moved during the period as compared with the number of cars interchanged with other lines, as shown by the evidence, namely 4021, petitioners arrive at the conclusion that 63 per cent of the cars actually moved during the period were "interchanged with trunk line railroads." This conclusion is not correct, for there is no evidence in the record to show the number of cars which were delivered to or received from its electric line connections, and what number were received from or delivered to trunk line railroads. The evidence does show, however, both before the Commission and before the Court, how many of these cars originated on respondent's line and were destined to points in Utah, and how many originated in Utah and were destined to points on respondent's line. It also shows how many originated on respondent's line and were destined

to points outside the state of Utah, exclusive of points on respondent's line in Idaho, and how many originated outside the state of Utah, exclusive of points on respondent's line in Idaho, and were destined to points on respondent's line. 2450 cars were either received from or destined to points outside the state of Utah foreign to respondent's line, or 38 per cent of the total cars moved during the period. In other words, slightly in excess of one-third of the cars moved in interstate commerce, exclusive of cars moved to or from points in Idaho on respondent's line to or from other points on respondent's line.

It is to be borne in mind that the foregoing figures only deal with carload shipments. There is no evidence in the record as to the quantity of less than carload shipments, so that they do not give a complete picture of the quantity of the freight business which is interstate as compared to intrastate, or of the freight business which is interchanged and that which is not.

QUESTIONS PRESENTED

While the errors relied upon by the petitioners are six in number as stated in their petition for writ of certiorari herein, they can be reduced, as we view it, to three: (1) that the trial court had no authority to determine independently on the evidence presented to it whether respondent is an interurban railroad, but is bound by the finding of the Interstate Commerce Commission that it is not, at least unless the finding of the Commission is not based upon substantial evidence, or is arbitrary or capricious; (2) that the finding by the Interstate Commerce Commission that respondent is not an interurban railroad is not "arbitrary, capricious, or without substantial evidence to support it"; (3) that, assuming the trial court had authority to determine the question independently, the finding of the trial court that respondent is an interurban railroad is not supported by the evidence introduced at the trial.

We shall consider these questions in this brief in their inverse order, because that is the order in which they arose in the trial court. [11]

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[11] It is to be borne in mind that the amended bill of complaint made no reference to the report of the Interstate Commerce Commission, but that report was pleaded as an affirmative defense by both petitioners.

SUMMARY OF ARGUMENT

I

The uncontradicted evidence introduced at the trial and re the Commission shows that respondent is an inter-n.

It is admitted that the respondent is an electric railway, that it is not operated as a part of a general steam-oad system of transportation, and that it is not any part he general steam-railroad system of transportation ated by any other motive power. The sole question, ming that the trial Court had a right to determine the tion before it on the evidence before it, is whether re-dent is an interurban railroad within the meaning of term as used in the proviso of Section 1, First, of the way Labor Act.

An interurban railroad is a railroad whose purpose is nder a type of transportation service, either passenger eight, which is distinct from that of any other type of sportation service, as for example, the transportation ice of the ordinary steam railroad, or that of the truck , and whose physical characteristics are such that it mited to rendering such service and, without being nstructed, cannot be transformed into any other type ansportation system. The uncontradicted evidence shows the purpose of the respondent as constructed, and as since maintained, is to render a type of service to the le of the territory it serves that is distinct from the type ervice rendered by any other type of transportation em, which is shown by the fact that it resulted from the nsion and connection of existing street car systems into agricultural sections far removed from the markets and ers of population, affording to the people of the territory d transportation at frequent intervals from one com-ity to another, and to the outside world, by means of t trains stopping at frequent intervals. In other words, nding what is practically street car service into the urban rural territory served, and encouraging the building ndustries upon its lines, such industries being the only stries possible in such a territory, namely, processing ts for the processing of agricultural products; collect-

ing and transporting such products of the soil as can be marketed without processing to the trunk lines for transportation by them to the outside markets; transporting such products as have to be processed to the processing plants, and after processing delivering them to the trunk lines for transportation to outside markets, and bringing into the territory materials needed by the processing plants in the processing of such products, and the freight and supplies needed by the farmers in the territory; all of such transportation service being rendered by the operation of short, but rapidly moving trains, making stops at practically every cross road (in other words, a peculiarly local service), and which was constructed and ever since been maintained with physical characteristics, each coordinated with the others, which limit it to the character of service which it is to provide, and without being entirely reconstructed it could not perform any other type of transportation service.

II

The finding by the Interstate Commerce Commission that respondent is not an electric interurban is arbitrary, not supported by the evidence, and is against and contrary to law.

Notwithstanding the uncontradicted evidence, as above outlined, the Interstate Commerce Commission found that the respondent is not an interurban railroad, and that finding is arbitrary, not supported by the evidence, and is against and contrary to law, (1) because it is based solely upon the fact that with no change in the peculiarly local service, both passenger and freight, which it renders the territory served by it, or in its physical characteristics which compel that type of service, its freight business, due solely to a cause beyond respondent's control, has come to preponderate over its passenger business, such preponderance being due wholly to the increase in travel by the people of the territory in privately owned automobiles, thus reducing respondent's passenger business. Such a factor or test under such circumstances is not relevant to the determination of whether respondent is an interurban, either in the sense as commonly understood by the public or as intended by the Congress, which has, in many statutes recognized that neither the

tity or character of the freight it transports prevents lroad from being an interurban.

(2). Because the respondent has been determined to n interurban railroad by other governmental agencies, by the Interstate Commerce Commission itself, and par- arly by reason of the fact that the Commission has per- d respondent to issue securities without the permission it that would be required if it were not an interurban.

III

The finding of the Interstate Commerce Commission that ondent is not an interurban railroad is not in any wise ing upon the Court:

1. Because the Congress in enacting the proviso has nly not manifested an intention that it should be binding, as evidenced in the Act itself a contrary intent.

2. Because, as pointed out in the majority opinion ered by the Circuit Court of Appeals, the Commission's ority does not extend to a determination as to respond- status as to being or not being an interurban railroad.

3. The Congress has not manifested its intention that determination of the Commission shall be binding upon Courts even if it was not arbitrary, capricious or not orted by substantial evidence.

4. That in the absence of express limitations, the Courts authority to try de novo the question as to the status spondent.

5. The question as to respondent's status as an inter- n is a mixed question of law and fact.

6. Because the constitutionality of the Railway Labor has been challenged in good faith by the respondent.

ARGUMENT

I

The uncontradicted evidence introduced at the trial shows that respondent is an electric interurban railroad.

It has been conceded throughout the case and it is now conceded that the respondent in the trial before the court proved that the threats of prosecution had been made by the petitioner Shields as alleged, and that the respondent would suffer irreparable injury and damage if it were held that the respondent was subject to the Act. It has also been conceded throughout the case and is now conceded that respondent is an electric railroad, and is not that type of interurban railroad that, notwithstanding its interurban character, is within the terms of the Act namely an interurban railroad "which is a part of a general steam-railroad transportation system," and likewise that it is not that type of interurban railroad which, notwithstanding its interurban character, is within the terms of the Act as being "any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power"; in other words, as applied to the situation here, that respondent is an independently owned and operated railroad, and is not the electrified part of a steam-railroad system of transportation.

The admission has not been so express on the part of the intervening petitioner (Interstate Commerce Commission) because some point has been made by it as to the use of the definite article in the phrase last quoted from the proviso, instead of the indefinite article. But the meaning of the phrase is clear in the light of the reason for its adoption, which was to prevent any steam railroad claiming that it had transformed itself into an interurban railroad by the use of motive power other than steam; though it would have been clearer if the word "that" instead of the word "the" had been used. But apart from this, all the way through, the intervening petitioner has conceded that the sole question is whether the respondent is an interurban railroad, and it has differed from the respondent only as to who shall finally make the determination, the Commission or the Courts.

Assuming then, that the Court had authority to determine the question as to whether respondent is an interurban railroad, without regard to the finding by the Commission, and the Court's finding in that respect is supported by the evidence introduced at the trial, the judgment must be affirmed, because upon this assumption, the only claimed error is with respect to this finding, and, unless there was error in this finding, (there being no error claimed as to any other finding) the judgment of the Court must be affirmed.

We have heretofore set out in detail all the evidence at the trial as to the status of the respondent. At its conclusion, the Court said he could not find otherwise than that the respondent is an interurban railroad, and did find that it is. [12]

Now, it is not quite clear as to why the petitioners (assuming the court had a right to determine the question independently) claim the court erred in making such a finding. True, they speak, as does the Interstate Commerce Commission in some of its decisions, notably in its later decisions which are cited by counsel, of interurban railways changing into railroads of the type of the ordinary steam railroad, as the Piedmont & Northern, which was considered by the Supreme Court of the United States in the case of *Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission*, 286, *U. S.* 299, and will later herein be referred to, and we concede that an interurban railroad might so change its characteristics as to develop into a railroad of the type of the ordinary steam railroad, but so far as the respondent is concerned no such claim can be made. When it was built, it was but the extension of and the connecting of two street car systems, and as constructed had all the characteristics of an interurban railroad, rendering a service separate and distinct from the type of transportation service, both passenger and freight, furnished by the ordinary steam railroad, or by the particular steam railroad which it parallelled. The evidence as above outlined shows that it has never changed its original physical characteristics, or its type of operation

[12] The other evidence, consisting of exhibits and testimony introduced before the court, are not referred to herein, because it either did not bear upon the question of the status of the respondent, or was concerning matters of which the Commission had knowledge or of which it would take judicial notice.

or service rendered, and moreover that it could not, if it desired, transform itself into a railroad of the ordinary steam railroad type, so as to render that type of transportation service which is rendered by a steam railroad, without being rebuilt and relocated as well. In addition to being reconstructed, it would also have to be relocated in order to eliminate grades and curves and be rid of the necessity of using city and town streets as a right of way, with attendant franchise limitations appertaining thereto.

The only change in respondent's situation is the loss of passenger revenue, not because of any change in its physical characteristics, or its type of operation or service, but because of the public preferring another method of transportation, the use of the private automobile, so that the history of its building having shown that it was then an interurban, counsel would be forced, if they claim that it is now a railroad of the type of the ordinary steam railroad, to contend that instead of developing into such a railroad by transforming itself into one, it has shrunk into one, which is absurd. They also speak of the preponderance of freight revenue and advert to the percentage of that traffic which is interstate, but stop short of claiming that either is a determinative factor, or that both taken together are, probably because it is so obvious that they or either of them cannot be, for the reason that we would then have a railroad, which, with no change in its physical make-up, would or would not be an interurban, because of the manner in which the public uses its service. If passenger traffic falls off, though it be for a reason beyond the railroad's control, as for instance, because of the increase in the use of the private automobile, it loses its interurban character; if for some reason beyond its control it loses its freight business, as, for instance, by truck competition, then it is thereby changed back into an interurban, and no one could tell what it would be at any time in the future.

Moreover, assuming that the trial court had a right to determine the status of the respondent as to being an interurban railroad on the evidence before it, its finding that respondent was an interurban railroad exempt from the Railway Labor Act, which finding was concurred in by the Circuit Court of Appeals for the Tenth Circuit, by its affirmance of the judgment of the trial court, will not be reviewed

this court, unless this court determines as a matter law that the lower courts ascribed the wrong meaning to the term interurban, which, as we have shown, they not. *Virginian Railway Company vs. System Federation No.* 40, 300 *U. S.* 515, 542; *Texas & N. O. R. Co. vs. Brotherhood of R. & S. S. Clerks*, 281, *U. S.* 548, 558; *Pick Co. vs. General Motors Corp.*, 299 *U. S.* 3, 4, *ante* 4, 5; *Cincinnati, etc., Ry. Co. vs. Interstate Commerce Commission*, *U. S.* 184, 196; *Crowell vs. Benson*, 285 *U. S.* 22, 65.

II

The finding by the Interstate Commerce Commission respondent is not an electric interurban railroad is arbitrary, not supported by the evidence, and is against and contrary to law.

As has already been pointed out in the statement of the case, the petitioners pleaded the report which constituted determination of the Interstate. Commerce Commission the respondent is not an interurban railroad exempt from Railway Labor Act under the quoted proviso. So, when the trial respondent had rested its case, petitioners introduced in evidence the report of the Commission, (R. 146) which was all the evidence introduced in behalf of the petitioners, and that evidence was obviously introduced in support the allegations in the affirmative answers of petitioners "the Commission's determination that an electric railroad does not come within the proviso * * * * is controlling, was arbitrary; unreasonable or not based upon substantial evidence." In rebuttal of this evidence the respondent introduced in evidence the entire record of the hearing before Commission. As hereinbefore pointed out, that evidence consisted of a series of exhibits numbered 1 to 28, inclusive, explained by the general manager of the respondent, prepared them. The evidence introduced at the consisted of the same exhibits, with the exception of one numbered 28, the substance of which was, however, testified to by the same witness who explained the exhibits before the Commission. There was only one exhibit introduced at the trial which was not introduced before the Commission and which related to the status of respondent an interurban railroad, (Exhibit 8, R. 166-167) and certain evidence which was within the knowledge of the Commission, were concerning matters of which the Commission would take judicial notice. Exhibit 8 was introduced for the purpose

of showing that the electrical positive feeder and trolley circuit and the negative rail circuit used by the respondent was so limited that they are only sufficient to operate the locomotives with the practical rating capacity of the locomotives owned by respondent. In other words, the evidence was wholly cumulative, because the other physical characteristics of the railroad, apart from this limiting factor, necessarily limit the character of respondent's operations to that which is essentially different from that of the ordinary steam railroad. So that the evidence with relation to the status of respondent was practically the same both before the Court and before the Commission. Nevertheless the Court, as has already been pointed out, made separate findings in accordance with the issues with respect to the evidence before the Court and before the Commission. It found upon the evidence introduced before it upon the trial that the respondent is an interurban railroad; it found that the determination by the Commission that the respondent is not an interurban is "against and contrary to law." (R. 67.) It has been suggested by the petitioners that the Court disregarded the report by the Commission, but such is not the case, for, upon the issues made as to the effect of the Commission's determination, the Court made the foregoing finding wholly upon the evidence before the Commission. This is not only shown by the findings themselves, but by the statement of the Court at the trial. He said "I have intimated heretofore, as I now view it, if I make any findings with respect to the report of the Interstate Commerce Commission it will be based solely upon what was before them." (R. 79.) He had previously said "I am not going to consider the findings of the Interstate Commerce Commission except upon its own record." (R. 78.) It is reinforced by what he said at the conclusion of the trial as follows:

> "I will find as the fact in this case, both from the evidence introduced and also from the record submitted before the Commission, that this railroad, this line of the plaintiff company here, is a line of railroad operated by electric power; second that it is known as, and in fact is, an interurban electric railway which is not now and never has been operated as a part of a general steam railroad system of

transportation. * * * I cannot find anything else. That is clearly what the record shows—both records. It is only a question of conclusion of law whether or not from those findings you are entitled to a judgment as prayed. * * * I have found that it is a line of railroad, that it is an electric interurban railroad line, and that it is not any part of any general steam railroad. Now, I will also find, if necessary to include all the proviso, that it is not a railroad line that is operated by any other motive power than electricity. Now, they are the only items in the proviso. If you people want to think it over from that standpoint of those findings until morning, I will stay here with you and talk with you tomorrow morning about it. * * * I don't see how I can avoid making those findings upon the evidence, irrespective of which record you take, either the record made before me or the one made before the Commission. Unquestionably that is what they show."

This finding is attacked by the petitioners. We do not n it necessary to a determination of this case for this rt to determine whether it is subject to attack or not, use, as we shall hereafter attempt to show, the Court the right to make the finding as to the status of respondindependently of any determination by the Commission. if this Court should hold otherwise, then we say that finding by the Court is amply justified.

It is true that the petitioners have complained that ind of the Court finding that the determination of the mission was arbitrary or not supported by the evidence, ound it was "against and contrary to law"; but what erence does it make? If the determination of the Comion was based upon evidence which was irrelevant to ssue, it was against law; likewise, if it was not supported ny substantial evidence, because if the evidence is subtial it must be pertinent to the issue, it cannot be levant thereto, and necessarily if the Commission made finding solely upon irrelevant evidence, if it used as a rmining factor that which has no real bearing upon the e, then it is arbitrary, because the basis, or test, used is trary.

In the concurring opinion of Mr. Justice Brandeis in the case of *St. Joseph Stockyards Co. vs. United States*, 298 *U. S.* 37 (at page 74) the following appears:

> "Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State. Compare *Kansas City S. R. Co. vs. C. H. Albers Commission Co.*, 223 *U. S.* 573, 591; *Cedar Rapids Gaslight Co. vs. Cedar Rapids*, 223 *U. S.* 655, 668, 669. It may set aside an order for lack of findings necessary to support it, *Florida vs. United States*, 282 *U. S.* 194, 212-215; *or because* findings were made without evidence to support them, New England Divisions Case (*Akron, S. & Y. R. Co. vs. United States*), 261 *U. S.* 184, 203; Chicago Junction Case (*Baltimore & O. R. Co. vs. United States*), 264 *U. S.* 258, 262-266; or because the evidence was such "that it was impossible for a fairminded board to come to the result which was reached," *San Diego Land & Town Co. vs. Jasper*, 189 *U. S.* 439, 442; or because the order was based on evidence not legally cognizable, *United States vs. Abilene & S. R. Co.*, 265 *U. S.* 274, 286-290; or because facts and circumstances which ought to have been considered were excluded from consideration, *Interstate Commerce Commission vs. Northern P. R. Co.*, 216 *U. S.* 538, 544, 545; *Northern P. R. Co. vs. Department of Public Works*, 268 *U. S.* 39, 44; or because facts and circumstances were considered which could not legally influence the conclusion, *Interstate Commerce Commission vs. Diffenbaugh*, 222 *U. S.* 42, 46, 47; *Florida East Coast R. Co. vs. United States*, 234 *U. S.* 167, 187; or because it applied a rule thought wrong for determinating the value of the property, *St. Louis & O. R. Co. vs. United States*, 279 *U. S.* 461. These cases deal with errors of law or irregularities of procedure."

The Commission arrived at its determination that respondent is not an interurban railroad wholly and solely

ecause of the character and extent of its freight business s compared with its passenger business. In its report the Commission said, quoting from its decision in *Texas Electric Railway*, 208 *I. C. C.* 193, at page 202:

"'The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives, supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. In harmony with that and similar decisions, we are of the opinion that an electric railway which is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue, which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam railroads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric power than of an interurban as that term is used in the exemption provision under consideration. Of course, there are many other circumstances and conditions which may have a bearing on the question, and some electric railways are of such an unusual character that their status might depend on other things, but we believe the factors referred to are generally the most important and should be given great weight where all of them exist together.'" (R. 51, 323; 214 I. C. C. 707, 714.)

The Commission also said in its report as to the status of respondent:

"The Utah Idaho Central was found not to be a street, suburban, or interurban electric railway within a similar exemption provision of the Locomotive Inspection Act in Rules for Testing Other than Steam

Power Locomotives, 122 I. C. C. 414. The appendix to that report shows that this carrier's freight revenues were less than double its passenger revenues during the years for which the figures were then given, 1923, 1924, and 1925, whereas the present record shows that its freight revenue was more than six times its passenger revenue in 1933 and 1934. Such previous decisions relating to the status of the same carrier under a similar exemption provision should not be lightly departed from in the absence of changed conditions, and such changes as have taken place with respect to this carrier tend to confirm and strengthen the conclusion that it is not a street, interurban, or suburban railway."

The Commission in its use of the above language and particularly in its reference to changed conditions as to revenues, accepts the conclusion which inevitably follows. If the character of revenue is to determine whether or not a particular railroad is an interurban, that it may be in certain periods an interurban and then, because of a change in the character of its revenue, in other periods be not an interurban railroad, notwithstanding there has been absolutely no change in its physical characteristics or the manner of its operations controlled thereby and the change in revenue is brought about by conditions over which the railroad has no control which, as we view it, conclusively demonstrates that such a test is not a proper one.

It will be observed that the two paragraphs above quoted from the Commission's report are not entirely consistent, because in the first paragraph quoted the Commission states that it makes no difference whether or not its freight revenue is greater than its passenger revenue in determining the question whether a particular railroad is an interurban railroad, and yet in the second paragraph it bases its decision as to the status of respondent upon the proposition that its freight revenue is greater than its passenger revenue; and this is reinforced by the final reason given in its report for holding that respondent is not an interurban railroad. It says "In all the Commission's decisions dealing with the status of electric railways under the same and similar exemption provisions it has never found one which derives so large a

proportion of its revenues from freight as this carrier does, to be an interurban." (R. 53, 325; 214 I. C. C. 707, 716.)

In this connection we deem it proper to point out that, notwithstanding what the Commission has said in the above quoted portions of its report, the Locomotive Inspection Act has an exemption provision similar to that contained in the Railway Labor Act and other acts exempting interurban railroads from their provisions, the fact is that the exemption provision in the Locomotive Inspection Act differs from the exemption provisions in all the other acts, as was conceded by the Commission in its decision *"In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other Than Steam Power, etc.,"* 122 *I. C. C.* 414, for in that decision the Commission said:

> "The first bill introduced, H. R. 5836, providing for amendment of the locomotive-inspection act in 1924, carried a provision amending section 2 of the act, and also provided that as amended it should 'not apply to and include an electric or gasoline motor car operated on a street, suburban, or interurban railway not operated as a part of a general steam railroad system of transportation.' Hearings were held before the committee on interstate and foreign commerce of the House of Representatives on that bill. The amendment, H. R. 8578, which was approved June 7, 1924, however, did not contain this provision. Instead, section 1 of the act was amended to read as follows:
>
> "That when used in this Act the terms 'carrier' and 'common carrier' mean a common carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation.
>
> "From section 1, as enacted, it seems clear that every carrier by railroad which is subject to the Interstate Commerce Act and which is not in strictness a street, suburban, or interurban electric railway, is subject to the locomotive-inspection act, as amended.

And even though it is a street, suburban, or in
urban electric railway, if it is operated as a part
a general railroad system of transportation, such a
tric railway is also within the scope of the locomoti
inspection act, as amended. Under the bill f
introduced, H. R. 5836, certain equipment
excepted although used on a street, suburban or in
urban railway, unless such railway was operated
a part of a 'general *steam* railroad' system of tra
portation. But the expression was changed and
word 'steam' eliminated. Evidently Congress inten
to include street, suburban, and interurban elec
railways if operated as a part of *any* general railr
system of transportation, otherwise the word 'ste
would not have been eliminated from the expressio

The matter was determined by the Commission, exc
as to those railroads which participated in the hearing, u
questionaires sent to the various electric railroads ask
only for information as to a comparison between their fre
and passenger revenue, and, so far as the respondent
concerned, that was all the evidence upon which the find
of the Commission was based, and that basis, as we h
shown, is not a proper basis for determining status as
being or not being an interurban, and while it is still
basis of the Commission in determining the status of
respondent, it is a basis which even the Commiss
as we have pointed out, has expressly repudiated. It
obvious that the Commission seized upon the peculiar word
of the statute as an excuse for extending its jurisdiction
include practically all locomotives used by electric railro
It being a safety measure for the protection of the employ
of the railroad, and therefore liberally to be constr
no objection was made by the respondent, or the other elec
railroads of the country, to having their locomotives sub
to the inspection law as a safety measure. And the deci
having been made upon a statute not like the one he
involved, it cannot be regarded as a precedent for the
struction of such a statute.

Now it being admitted, even by the Commission, that
preponderance of revenue, as between freight and passen
business, is not a factor by which to determine whethe

railroad is or is not an interurban, we shall proceed to consider the factors laid down by the Commission in the first above quoted paragraph of its report in the case of the respondent which it claims are determinative of whether or not a railroad is or is not an interurban. The Commission said that a railroad is not an interurban (1) if it is engaged in the general transportation of freight; (2) that it handles the bulk of such freight in standard equipment similar to that used by the steam railroads; (3) that it freely interchanges such standard equipment with steam railroads for transportation to or from points on their lines, a considerable portion of such freight being handled in interstate or foreign commerce; and (4) which participates in joint rates with the steam railroads for interstate transportation. That none of these factors can be considered determinative of the status of a railroad as to being or not being an interurban is settled, as we contend, beyond question.

Taking them up seriatim, the first is not (a) because, in the common understanding of the term interurban railroad there is not implied any inhibition against engaging in the general transportation of freight. From the time that such railroads came into existence many of what were known as interurbans were engaged in the general transportation of freight, Special Reports of the Bureau of Census, Street and Electric Railways, 1902, (R. 261-263), 1907 (R. 263-265). And from that time on the increase in freight business by interurbans was so notable as to be commented upon in the Special Reports of the Bureau of Census, Central Electric Light and Power Stations and Street and Electric Railways. (265-266.)

(b) The Interstate Commerce Commission itself, in a long series of decisions, specifically recognized that interurban electric railroads were extensively engaged in the business of transporting freight.

Chicago and Milwaukee Electric Railroad Co. vs. Illinois Central Railroad Co., 13 *I. C. C.* 20;

Cedar Rapids & Iowa City Railway and Light Co. vs. Chicago & Northwestern Ry. Co., 13 *I. C. C.* 250;

West End Improvement Corporation vs. Omaha & Council Bluffs Railway and Bridge Co., et al, 17 *I. C. C.* 239;

Cincinnati & Columbus Traction Co. vs. B. & O. Southwestern R. R. et al, 20 *I. C. C.* 486;

St. Louis, Springfield & Peoria R. R. et al vs. P. & P. U. Railway Co., 26 *I. C. C.* 226;

Louisville Board of Trade et al vs. Indianapolis, Columbus & Southern Traction Co. et al, 27 *I. C. C.* 499;

Michigan R. R. Co. vs. Pere Marquette R. R. Co. et al, 74 *I. C. C.* 496.

(c) Other governmental administrative bodies have so held, and particularly the Railroad Labor Board, established under Title III of the Transportation Act of 1920, which exempted from the Act interurban railroads in precisely the same language as used in the Railway Labor Act under consideration. (Decision No. 33, Docket No. 26 A.) See also the letter from Director General of Railroads showing that respondent was not subject to the Federal Control Act (R. 110). But what is more controlling is that Congress itself has continuously assumed that a railroad may be an interurban notwithstanding it is engaged in the general transportation of freight.

Section 15 (3) of the Interstate Commerce Act, approved in 1910, provides:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character";

Section 1 of the Federal Control Act, approved in March, 1918, provides:

> "Provided, however, that nothing in this paragraph shall be construed as including any street, or interurban electric railway which has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat and light or both."

Sections 204 and 208 of the Transportation Act, 1920, contain almost identically the same language as Section 1 of the Federal Control Act.

Section 15a of the Interstate Commerce Act, before it was amended in June, 1933, provided:

> "* * *; the term 'carrier' means a carrier by railroad * * *, excluding * * * *, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight* * * *."
> (Italics ours.)

and Section 77(r) of the Bankruptcy Act, approved in March, 1933, and paragraph (m) which superseded paragraph (r) in August, 1935, reads as follows:

> "The term 'railroad corporation' * * * means any common carrier by railroad * * *, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard railroad freight equipment"

The second factor used by the Interstate Commerce Commission is not, (a), because nowhere can there be found any intimation in the common understanding of the term "interurban" there is implied any inhibition against the use of any particular equipment in the transportation of freight.

(b) It would be absurd to prevent interurbans from using standard equipment for the transportation of freight, because such a requirement would entail the necessity of transferring such freight received or forwarded to any steam line from the car in which it was being transported.

In 1910 it was proposed to amend the Interstate Commerce Act by inserting a provision giving the Interstate Commerce Commission the power to establish through routes and joint rates between carriers.

As the bill came before the Senate Committee on Interstate Commerce for hearing, it contained the following language:

> "The Commission shall not, however, establish any through route, classification, or rate between street, suburban, or interurban electric passenger railways and railways of a different character."
> Senate hearings, Vol. 18, pp. 1027-1042.

Various parties appeared before the Senate Committee and urged that interurban electric railways performed a freight business and that such lines should be included within the Commission's power to require the establishment of through routes and joint rates. In the discussions before the Committee, it was shown that the foregoing quoted language as proposed would exclude interurban electric railways doing a freight business. The Senate Committee accepted this viewpoint of the witnesses, and, as the amendment was finally adopted and is still in the Interstate Commerce Act as a part of Section 15 (3), the Commission was left with jurisdiction to prescribe through routes and joint rates between steam railroads and interurban electric railways engaged in the general transportation of freight. The provision adopted at that time as part of Section 15 (3) is as follows:

> "The Commission shall not, however, establish any through route, classification or practice, or any rate, fare or charge between street electric passenger railways not engaged in the general business of transporting freight, in addition to their passenger and express business, and railroads of a different character."

This provision has been enforced by the Interstate Commerce Commission in many cases. *St. Louis, Springfield & Peoria Railroad et al.; vs. Peoria & Pekin Union Railway Co.*, 26, *I. C. C.* 226, *Louisville Board of Trade et al., vs. Indianapolis, Columbus and Southern Traction Company et al* 27 *I. C. C.* 499, *Chicago, Ottawa & Peoria Railway Co. vs. Chicago & Northwestern Ry. Co. et al.*, 33 *I. C. C.* 574. In the latter case the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes

and joint rates with interurban electric railroads engaged in the interstate transportation of freight has long been settled." (Citing cases.)

Of course, it would be absurd to establish through tes and joint rates between interurbans and other railds without using standard equipment, and the fact it is nsive, or otherwise, could not have the effect of transming what would otherwise be an interurban into any er type of railroad.

(c) There is no evidence in this case that the rendent handles the bulk of its freight in standard equipment, there is no evidence as to the comparative bulk of its load business with its less than carload business, and the dence is that the less than carload business is transported the same type of equipment as its baggage and express transported.

(d) The Congress has expressly recognized that a railad may derive more than fifty per cent of its operating venue from the transportation of freight in standard steam ilroad freight equipment, (Section 77 (r) (m), as amended, the Bankruptcy Act, supra), and the amendment was ssed after the enactment of the Railway Labor Act here in estion.

The third factor relied upon by the Interstate Commerce ommission is not determinative, (a) because it is too indefite to afford any reasonable or intelligent basis, for what ight be a considerable portion in one man's mind might be considerable in another's, and what would be considerable one railroad would not be on another; (b) the amount freight that moves in interstate commerce depends not any change in the physical characteristics of the railroad, t on the extent to which the public may use its facilities in a rticular movement over which the railroad has no control; c) if adopted as a test it would result in the railroad changing s character from time to time without any change in its hysical characteristics or operations, depending on whether considerable portion of its exchanged freight moves in terstate commerce, and no one could determine in advance s to what its status as to being an interurban would be at ny particular time; (d) the railroad as a common carrier

is in duty bound to interchange such freight—indeed might be compelled to do so. All interurban electric railways engaged in interstate commerce are subject to the Interstate Commerce Act, and to the jurisdiction of the Commission except where exempted. *United States vs. Village of Hubbard, Ohio*, 266 *U. S.* 474. Paragraph 4 of Section 1 of the Interstate Commerce Act (Part I) provides:

> "It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable requests therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes * * * * *."

Paragraph (3) of Section 3 of the Interstate Commerce Act, (Part I) provides:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines * * * * *."

To say that the performance of that duty which is enjoined by law, would change the railroad's character, although its physical characteristics and operations remain the same, would be anomalous. (e) It is adopting a test which has never been adopted by Congress, but one which that body has rejected and still continues to reject.

The fourth factor relied upon by the Commission is not determinative, (a) because, as we have pointed out, the respondent is in duty bound under the law to establish such joint rates; (b), business which it is contemplated by law shall be interchanged cannot be interchanged without such joint rates, as well as through routes; and (c), as already pointed out, the Commission has consistently upheld its jurisdiction to compel the establishment of through routes and rates between steam and interurban lines engaged in the transportation of freight; and (d), this Court has held in *U. S. vs. Chicago, North Shore & Milwaukee Ry. Co.*, 288 *U. S.* 1, that an electric line which had in effect

206 tariffs in which it participated as an initial carrier, and over 800 tariffs in which it participated as a delivering or intermediate carrier, in conjunction with standard steam railroads, was nevertheless an interurban railroad.

It will be observed that the Commission in the quoted paragraph from its decision in the *Rules for Testing other than Steam Power Locomotives, supra,* say that an electric line in which all the factors above enumerated appear partakes more of the characteristics of a "commercial" railroad operated by electric power than an interurban, but there is no mention, either in the Locomotive Inspection Act or in any other act excluding interurbans from their provisions of the term "commercial railroad." The Commission coined this term, not as meaning a railroad engaged in commerce, which is its real meaning, but as meaning a railroad engaged in the general transportation of freight. Thus the Commission sought by giving that meaning to the carriers included within the Act, as contradistinguished from interurbans, to extend its jurisdiction to include freight carrying interurbans, the Commission in its annual report to Congress in 1922 said:

> "Under the law as it now stands, we have no jurisdiction over * * (an) interurban electric railway * *. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Unless such lines are held not to be 'street, suburban or interurban' electric railways, they are not subject to our jurisdiction. * * *."

So, here is definitely shown the origin of the idea that these electric railways could be brought within the Commission's jurisdiction by holding that they are "not interurban" electric railways, merely because of their freight business.

Although the factors stated in *Rules for Testing other than Steam Power Locomotives, supra,* were not formerly announced until that decision was rendered in 1927, the Commission, as pointed out by petitioners, had intimated in two previous cases that an electric railroad might be held not to be an interurban because of the character of its freight business—*Proposed Control of Sacramento Northern Railway by Western Pacific Railroad,* 71 *I. C. C.* 656 (1922), 79 *I. C. C.* 782 (1923)—but in those cases the Commission

was dealing with the case of an electric railroad, the control and ownership of which was sought by a steam railroad system, namely the Western Pacific, so that it was unnecessary to decide what effect its freight business might have upon its status as an interurban.

Indeed, never prior to the decision in *Rules for Testing Other than Steam Power Locomotives*, *supra*, had the Commission considered the factors therein enumerated as decisive of the status of a railway as to its being an interurban. On the contrary, in *Application of Section 15(a) of the Interstate Commerce Act to Electric Railways*, 86 *I. C. C.* 751, (1924), the Commission had occasion to construe Section 15 (a) which became a part of the Interstate Commerce Act by the Transportation Act, and was commonly known as the "recapture section," and provided for a fair return to railroad companies and a recapture of excess income by the Interstate Commerce Commission. Excluded from Paragraph 1 of that Section were:

> "(c) Interurban electric railways operated as a part of a general steam railroad system of transportation, or engaged in the general transportation of freight;"

In that case the Commission recognized the fact that many of these electric lines designated in the language of this section of the act as "interurban electric railways" were in fact, heavy freight carrying railways, because this language was used:

> "Interurban electric railways closely resemble steam roads in some particulars of freight transportation and are not greatly dissimilar in others."

At page 753 the following may be found, which emphasizes that the distinguishing characteristics of interurban electric railways, as contended for by us, were still fully in the minds of the Commission in the decision in this case, notwithstanding its efforts to get away from them:

> "Between steam roads and most interurban electric roads there exists a wide distinction in methods of operation and in physical and other characteristics."

Then there is set out the differences with regard to rights of way, the character of traffic, the use of public streets by interurbans, the nature of the construction, and the local regulations which prevent complete use of steam railroad equipment on the interurban lines. The matters of wages and operating expenses are mentioned as a "further disparity" and the Commission concludes:

> "Considering the responsibilities as well as the benefits of carriers under Section 15a, it seems clear that Congress intended to exclude interurban electric railways generally from its operation and to include them only when engaged in such general transportation of freight as would cause them to resemble steam roads in the performance of that function."

In the light of the foregoing language, can it be successfully contended that the Interstate Commerce Commission in 1924, the date of such decision, did not at that time understand the term "interurban electric railway," as used by Congress, includes such railways "when engaged in such general transportation of freight as to cause them to resemble steam roads in the performance of that function?"

In passing this particular case, reference should be made to the limited quotation from this case contained in the brief of petitioners, found on page 49, which is claimed to sustain the proposition that the relationship of freight to passenger revenue has a bearing in determining the status of a railroad, but taken in connection with the other language herein quoted, it has no such meaning as claimed by them.

Furthermore, in the Commission's annual report to Congress, dated December 1, 1924, specific mention is made of the foregoing case with regard to the application of Section 15a and again in its report to Congress in December, 1925, December, 1926, December, 1927 and December, 1928, specific reference is made to that case and the application of Section 15a to electric railways.

In its annual report to Congress, dated December 1, 1928, extensive reference is made to the various provisions of the Interstate Commerce Act excluding certain types of electric railways. After setting out the various sections in which

the exclusions occur, the Commission uses this very significant language:

> "In the construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways. Practically all of the interurban electric lines of the country are engaged to a greater or less extent in the transportation of freight. * * * Certain electric railway lines for many years have engaged largely in freight transportation, their business being substantially the same as that of steam railroads, the only material difference being in motive power. Where the functions of an electric line are substantially the same as those of an ordinary steam railroad, the public interest would seem to justify the exercise of our jurisdiction * * * to the same extent as in the case of steam railroads. However, the greatly varying circumstances of electric lines indicate the necessity of individual treatment. It is recommended that, instead of attempting to define the classes of electric lines that are exempt from our jurisdiction under the several provisions in question, a general exemption of all electric lines be substituted, excepting such lines as interchange standard freight equipment with steam railroad lines and participate in through interstate freight rates with such lines."

After reading this specific recommendation of the Commission to Congress in December, 1928, may it be truthfully asserted that the Commission did not understand that the term "interurban electric railways" as used generally included interurban railroads, notwithstanding they were engaged in the general freight business? Here was a specific recommendation to Congress, based upon what the Commission considered the public interest, asking that interurban electric railways be held subject to their jurisdiction, if engaged in the general transportation of freight. But the Congress took no action at that time or at any subsequent time to comply with the Commission's recommendations, but the Congress did pass a statute in the year 1933, namely Section 77 (R) of the Bankruptcy Act amended in 1935, *supra*, which proved conclusively that it had no intention

of adopting the Commission's recommendations with regard to the meaning of the term "interurban electric railway."

In its annual report to the Congress, dated November 30, 1929, the Commission again recommended the adoption of its plan contained in its previous years' recommendations for the classification of electric railways, that is, amendments exempting all electric railways, except such as interchange standard freight equipment with steam railroads and participate in through interstate freight rates with such carriers.

In its annual report to the Congress, dated December 1, 1930, the Commission renewed its recommendations with regard to the adoption of new exclusion language concerning electric railways.

In its annual report of December, 1931, and again in its annual report for 1932, it renewed the same recommendations.

In its annual report in December, 1933, it made no recommendations, because of the fact that the law had created the office of Federal Coordinator of Transportation, which provided for recommendations from the Coordinator to be transmitted to the Congress, and not having received the Coordinator's recommendations the Commission made none.

In June, 1933, Congress amended Section 19a of the Interstate Commerce Act, which provided for the valuation of the property of carriers in the following language:

> The Commission "shall * * * * (value) all property owned or used by every common carrier subject to the provisions of this chapter, except any street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Commission may, in its discretion, investigate, ascertain and report the value of the property owned or used by any such electric railway subject to the provisions of this chapter whenever, in its judgment, such action is desirable in the public interest."

The Commission has not undertaken to value any of the interurban electric railways, including respondent, although

if respondent is not an interurban it is the duty of the Commission to value it, and the Commission has clearly violated its duty in this respect.

Again, in December, 1934, in its annual report to Congress, the Commission refrained from making a recommendation because of the fact that the Coordinator had not submitted a report to it.

In its annual report to Congress, dated December, 1935, the Commission described its jurisdiction over electric railways and called attention to previous recommendations made that the Congress substitute exemption language for that contained in the various provisions of the Interstate Commerce Act and it recommended specifically that Congress adopt its suggested revision of the exclusion language in the various sections of the Interstate Commerce Act.

So, then, in each year from 1921 to 1935, inclusive, in which it made a report to Congress, the Commission has reported to Congress with regard to this matter of electric railway exclusion. It has consistently and constantly recommended that Congress make some change in the statute to meet the wishes of the Commission. Congress, however, has constantly refused to act upon the Commission's recommendations, and, so far as the meaning of the term "interurban electric railway" is concerned, it stands exactly as it has always stood from the inception of these interurban electric lines down to the present date, with the exception of certain inconsistent decisions of the Interstate Commerce Commission itself, based upon its own desire to take jurisdiction of these properties, as revealed by its report to Congress in December, 1928, hereinbefore referred to.

On the contrary, Congress not only has not followed the Commission's recommendations with regard to a change of the exclusion language to meet the Commission's wishes, but by the adoption of Section 77 (m) of the Bankruptcy Act, *supra*, in August, 1935, Congress specifically recognised that an interurban electric railway might derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment.

After this long history of legislative action culminating in the passage of the Bankruptcy Act in March, 1933, can

there be any question that Congress has expressly decided that an interurban electric railway may transact an unusually large freight business, even to the point of deriving more revenue from the transportation of freight than it does from any other source, and irrespective of its intra- or inter-state character? Congress specifically said so in the Federal Control Act in 1918, in Section 204 and 209 of the Transportation Act, 1920, and in paragraph (r) of Section 77 of the Bankruptcy Act in 1933, and in Section 77 (m) of the Bankruptcy Act in 1935. All of these statutes, specifically stating as they do that interurban electric railways may derive a large portion of their revenues from the transportation of freight merely confirm and emphasize that the handling of freight or its character or the amount thereof is not a determining factor in determining whether a railroad is an interurban.

Yet in the brief of the petitioners (page 17 thereof), the petitioners argue that Congress in enacting the Railway Labor Act "approved the principles which the Commission had previously followed," as announced in respondent's case before it, whereas the truth is that the Commission was in its annual reports, continually begging Congress to justify such decisions by amending the exclusion provisions of the various Acts, because the Commission recognized that under such exclusion provisions it had no authority as it was doing to hold the electric railroads, including respondent, not to be interurbans solely because of the character or quantity of their freight business.

Petitioners further say that during the twelve years prior to the 1934 Railway Labor Act "the Commission had consistently interpreted the phrase 'interurban electric railway' as not including electric lines engaged to a large extent in the transportation of freight in the same equipment as the steam roads and interchanging such freight with the steam roads" (page 17 of petitioners' brief). Yet on October 29, 1926, in *Interstate Public Service Company Case*, 117 *I. C. C.* 228, the Interstate Public Service Company was found, in a formal case, not to be subject to the provisions of Section 15a of the Interstate Commerce Act, because it was not engaged in the general transportation of freight, whereas three and one-half months later, on February 17, 1927, in the Locomotive Inspection decision, this same company was found not to be

an interurban electric railway. Here are two different decisions with regard to the same property, within the space of three and one-half months, which were wholly inconsistent.

Petitioners claim that this Court has also held that the extent and character of an electric railway's freight business is a factor determinative of its status as to being an interurban railroad. However, in the case of *Spokane & Inland Empire R. R. Co. vs. U. S.*, 241 *U. S.* 344, this Court recognized that the term "interurban electric railway" included a freight carrying road. The opinion says:

> "The railroad company operated a street railway system in Spokane, Washington, and several interurban electric lines, one of which extended from Spokane to Coeur d'Alene, Idaho, a distance of about 40 miles. Over this line passenger trains composed of two or more cars were operated, starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits, and thence over its private right of way to Coeur d'Alene. The road was standard gauge with rails of standard weight and the passenger trains were made up according to standard railroad rules, with markers to designate the trains, and were run on schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations at which regular stops were made and express matter and baggage were carried on the passenger trains. The street car business was entirely separate from that done by the interurban line, the employes of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to or from stations outside the city. In addition to its passenger trains, the interurban line also operated freight trains, which, however, started from the company's yards and ran directly to Coeur d'Alene and did not therefore enter upon the street railway tracks."

Apart from this case two cases involving two different sections of the Interstate Commerce Act have been decided by this Court. Petitioners quote extensively from one of these cases, *Piedmont & Northern vs. I. C. C.*, 286 U. S. 299, *supra*. Such quotations, however, disregard the basic principles which the court set out as controlling in that case. That was a case arising under Section 1 (22) of the Interstate Commerce Act, which requires a certificate of convenience and necessity from the Interstate Commerce Commission before the construction of any new line of railroad, but excepts interurbans from its provisions. Piedmont & Northern was intending to extend its lines materially and as to this the court found that such proposed new construction without permission of the Commission would be in direct violation of the policy of the Transportation Act, 1920.

The court, speaking through Mr. Justice Roberts, said:

"In *Texas and P. R. Co. vs. Gulf C. & S. Ry. Co.*, 270 *U. S.* 266, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an 'industrial track,' as that phrase is used in paragraph (22), although by strict construction it was such."

The court further said:

"Thus it would become a connecting link in a new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines, leading from Florida and the southeast to the northern gateways * * * * ."

"Petitioner's own estimate contained in its application to the Commission is that the extension would

> gain new business diverted from steam railroads of 82,320 cars a year. * * * "

These quotations from the court's decision are clearly the basic factors on which the decision was predicated. It is a clear case of an interurban attempting to transform itself into a railroad of the ordinary steam railroad type. This is emphasized by the decision in the other case that went to the Supreme Court in regard to the exclusion language of Section 20a,—*United States vs. Chicago, North Shore & Milwaukee R. R. Co.*, 288 *U. S.* 1. In that case the Supreme Court referred to the former case of the Piedmont & Northern, supra, and said:

> "The facts differentiate the present case from *Piedmont & Northern Ry. Co. vs. I. C. C.*, 286 *U. S.* 299. There the railway was predominantly a carrier of interchange carload freight and the proposed extension of line which was the subject of that litigation had as its object the creation of a link in a trunk line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually."

By this reference in the North Shore case decision to the Piedmont & Northern case decision, the court itself distinctly holds that the Piedmont & Northern's position was determined solely under the exclusion language of Section 1 of the Interstate Commerce Act, and that the extensions proposed to that railroad would have been a violation of the policy and purposes of the Transportation Act with regard to the extension of lines, and therefore limited the effect of that decision to the precise question before the court.

In the North Shore case, as we shall hereinafter point out, the ground upon which the case turned was that the Commission had by settled administrative construction classified the railroad as an interurban. The court makes reference to the findings made by the trial court, not quoting them, but they are herein set out:

> "Congress * * * described these railways as street, suburban and interurban electric railways * * *

and by doing so adopted a descriptive term which had the sanction of time and common usage. Among the common characteristics * * * are that they use electric power in the transportation of passengers or freight or both, in intrastate and interstate commerce, occupy city streets and highways in addition to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds without agents for passengers; have short radius curves and operate part of their system under municipal and village franchise authority and restrictions." (Docket 10,067.)

The Supreme Court in its decision used this language with regard to the foregoing findings:

"The District Court, after making detailed and elaborate fact findings, concluded as a matter of law that the railway was an independently operated electric interurban railway expressly excepted from the requirements of the section (that is Section 20a, having the same exclusion language), the question is whether the facts found warrant the decision."

Incidentally the Supreme Court held that the amount of freight handled is not a determining factor. In stating the facts with respect to the road's handling freight, the court said:

"Appellee's tracks are of standard gauge, and are physically connected with those of four steam railroads at some thirteen points, and with those of three electric lines. Eight connections are used for handling inter-change carload freight. The railroad has substantial facilities for serving various industries located on its lines, such as side, industrial, team and switch tracks, and freight classification tracks. It owns seven electric locomotives which are of a small type and unable to haul freight trains of the size usually employed by steam railroads, and 114 freight cars which have no electrical equipment and are interchangeable with steam railroads. Sixteen local freight tariffs are published; in 206 tariffs the

railroad participates as initial c. ier, and in more than 800 as a delivering or intermediate carrier, in conjunction with steam railroads.

"The total transportation revenue in 1930 was over $6,000,000, about 76 per cent from passenger traffic and about 22 per cent from freight. This ratio has been substantially maintained for some years. In 1930, 87 per cent of carload freight traffic was interchange and 78 per cent of all freight traffic was interline, but only 42 per cent of freight revenue was derived from interline business.

"Locomotives are not employed in the passenger service, the cars having installed electrical equipment and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. A merchandise package delivery freight service is supplied by cars similar to baggage cars used on steam railroads, having self contained electric equipment, operated from the loop in Chicago to Milwaukee in trains of from one to five cars. At certain points gantlet tracks are required for handling freight cars, as the clearances on the main line are insufficient to permit their passage. Grades are much heavier than those customary on steam railroads, and some of the curves are of so short a radius as not to permit the passage of a steam locomotive. The company maintains no facilities for receipt or delivery of carload freight at its terminii in Chicago and Milwaukee, and cannot accomplish interchange of such freight at either, connections for this purpose being outside those cities."

After the court Stated these facts the opinion continues:

"We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interferring with performance of the main purpose of the carrier."

The history of the respondent is slightly different from that of the North Shore. It was constructed, it is true, to give a typically interurban passenger service, but at the

same time a typically interurban freight service of a purely local character. Incidental to that service, it was necessary to interchange freight in carload lots, and a small percentage of that interchanged freight may not be directly connected with the local purpose, but clearly it is incidental to it, and no claim is made that hauling of freight interfered with the road's performance of its passenger function.

The only reason, however, that the history of the respondent is in any wise different from that of the North Shore is that it was constructed to serve a territory which was purely agricultural in character and more sparsely settled, and the population could only be increased by a more intensive agricultural development, so that it was necessary for the respondent from the very onset to render not only an additional freight service to that which had been furnished by the then existing steam transportation railroad, but a service which was as distinctly interurban in character as the passenger service furnished by the respondent.

In its decisions with respect to respondent the Interstate Commerce Commission has been as inconsistent as with respect to other electric railways. In *Rules for Testing Other than Steam Power Locomotives, supra,* it held under an exception provision dissimilar to that involved in the Act herein in question (and involving a safety measure) that respondent was not an interurban railroad, but the respondent has, except for that, continuously been held by the Commission to be an interurban railroad. It is now, and has been continuously, receiving pay for the transportation of mail as an interurban railroad under the decisions of the Commission. In the year 1918 Congress enacted a statute covering railway mail pay service on urban and interurban electric railways (40 Stat. L. 748). This Act empowered the Commission:

> "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter by urban and interurban electric railway common carriers."

Two years prior to the passage of this Act, that is, in the year 1916, Congress had passed the Railway Mail Service Pay Act applicable to transportation of mail matter by rail-

way common carriers (39 Stat. L. 412). In a formal case, to which respondent was a party, the Commission refused to classify interurban electric railways as "railway common carriers," but instead held all of the electric railways of the country, except electrified sections of steam railroads, subject to the provisions of the statute of July, 1918, (40 Stat. L. 748), which covered railway mail pay service on urban and interurban electric railways. (58 I. C. C. 455.) In the decision of that case, known as the *Electric Railway Mail Pay case*, the Commission, among other things, said:

> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads so far as mail transportation is concerned. Many of them do considerable freight and express business, in addition to their passenger business. * * * A few lines receive greater revenue from freight and express than from passenger business."

In a second *Electric Railway Mail Pay* case, (98 I. C. C. 737), decided June 2, 1925, the Commission used this language:

> "Mail service is now authorized in the lines of 311 urban and interurban electric railway companies."

So, we have the Commission in both of these electric railway mail pay cases recognizing the meaning of the term "interurban electric railway," as including electric railways, whose revenue from freight exceeds that from passengers, including respondent, and it is in accordance with that decision that respondent has received and is receiving its pay for carrying mail (R. 95).

Moreover, during the entire period of its existence, respondent has continuously reported to the Commission its operations, not in the manner prescribed for railroads of the type of ordinary steam railroads, but in the manner prescribed for electric railroads, and certainly it is anomalous for the Commission to say suddenly, without any change in its character, it is a "commercial railroad" as the Commission uses that term, meaning thereby, that it is a railroad of the type of the ordinary steam type and should have been reporting as such. (R. 117-119.)

Finally. Respondent was reorganized out of receivership and issued 20,000 shares of non-par common stock and two million dollars in first mortgage bonds in the year 1926, without the authority and approval of the Interstate Commerce Commission as is required by Section 20a of the Interstate Commerce Act, if respondent is not an interurban electric railway. Under Section 20a such security issues are void (unless respondent is an interurban electric railway and thus exempted from the provisions of the section) and its officers and directors issuing the same are subject to penalties. Respondent believing itself to be an interurban electric railway and therefore not subject to the provisions of Section 20a, did not request approval of the Commission for the issuance of such securities.

The issue of these securities, however, was reported to the Interstate Commerce Commission on respondent's annual report form "G," and in the report, which was filed with the Commission on or about April 1, 1927, under the heading of "Explanatory Remarks," an attachment was made, explaining the set-up of the new company and its acquirement of the physical properties of the old company. Nearly a year later, the Director of Statistics asked for further information with regard to the sale of the property and the securities issued and such Director referred specifically to the pages of respondent's formal report, which is required from all common carriers generally subject to the Interstate Commerce Act.

There ensued over a period of more than two additional years correspondence between respondent's representatives and the Commission's representatives with regard to the method of accounting that respondent would be required to follow in showing on its books the reorganization of the company out of receivership and the issuance of the securities. In none of this correspondence, running over a period of three years or thereabouts, did the Commission make a single objection to the fact that the respondent did not request and receive authority for the issuance of the securities under Section 20a.

With as much involved as there was, were this respondent not an interurban electric railway and therefore subject to

Section 20a, it would seem almost unthinkable that the Commission, not having ever complained, could now determine under another statute with the same exemption provision that this respondent is not an interurban electric railway. If such determination is right at this time, then it would have been right at the time this matter of security issues and reorganization out of receivership was before the Commission in the correspondence mentioned.

Thus, this case comes squarely within the decision of this Court in the case of *United States vs. Chicago, North Shore & Milwaukee R. C., supra,* wherein this Court said:

> "The required annual reports filed by the appellee (the Chicago, North Shore and Milwaukee Railroad) with the Commission have shown all securities issued since March 1, 1920. * * * With this knowledge of the situation, the Commission never, until it requested the Attorney General to institute the present suit, by word or act, intimated that the procedure followed by the Railroad was illegal. * * * It would be difficult, indeed, to conceive a clearer case of uniform administrative construction of Section 20a as applied to this company. * * * The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has, for more than decade, resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

Petitioners make some point of the fact that there was no "affirmative or considered ruling by the Commission regarding it as an interurban," but neither was there in the North Shore case, and it certainly was arbitrary on the part of the Commission to hold when this case was before it that now the respondent is not an interurban railroad, when it had during all these years acquiesced in the issuance of these securities, which would be void if it were not an inter-

urban railroad exempt from the necessity of securing permission from the Commission to issue them.

In addition to the foregoing, no claim is made or can be made that there was any evidence before the Commission which showed or even tended to show that the respondent was not an interurban, except that relating to its freight business, nor can it be claimed that the manner in which the respondent was engaged in the freight business was not solely what caused the Commission to make its finding.

But the true test of whether the respondent is or is not an interurban is not the amount of freight it handles, nor the character of it, but whether its physical characteristics are such as to inhibit it from rendering that type of transportation service such as is rendered by an ordinary steam railroad and compels it to render no more than that type of transportation service ordinarily rendered by an interurban railroad; that the evidence as to the amount of freight carried by the railroads, or its character, as to being interstate or intrastate, has no bearing on that issue, and that a finding based upon such service is at the same time contrary to and against law, it is arbitrary, and it is without substantial evidence to support it.

There is, as we contend, no doubt as to the meaning of the term "electric interurban railroad" either in the common understanding of the term, or as defined by Congress; that what distinguishes them as interurbans is their physical characteristics, which necessarily combine to produce a type of transportation unit in the transportation system of the country as distinctive as any other type, and that the service they render the public is as distinctive as any transportation service rendered by any other type of transportation unit. But we say also that the efforts of the later Interstate Commerce Commission decisions, and the attempt of petitioners in support of the Commission in its efforts to change that meaning from that which is commonly understood and to say that because its revenue from its freight business is larger than that from its passenger business, or because such a railroad handles its freight in standard car equipment similar to that used by steam railroads, or because it interchanges the same with steam railroads, or because it participates in joint rates

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with steam railroads, or because it is engaged in the general transportation of freight, or because a considerable portion of its freight moves in interstate commerce, notwithstanding its physical characteristics remain unchanged, are not only unwarranted by any common understanding of the meaning of the term, but are in the teeth of congressional determination. We have heretofore quoted these various sections of the Acts of Congress in their exact language, as sections excluding certain electric interurban railroads from the operation of various laws, but let us now state them affirmatively instead of negatively. Congress, then, has said that an interurban electric railroad may have freight business as its principal source of revenue, and still be an interurban electric railroad, (U. S. C. A., Title 49, Section 73a, 77a, Section 77 (r) of the Bankruptcy Act of March, 1933, and 77 (m) of the Act of August, 1935,), that an electric interurban railroad may use standard steam railroad cars in the transportation of freight, (Section 77 (r) and (m) of the Bankruptcy Act) and still be an interurban electric railroad; it not only may, but it may be compelled to interchange its freight with steam lines, (U. S. C. A. Title 49, Section 15(3), and still be an interurban electric railroad; it may not only have joint rates with steam railroads, it may be compelled to have them (U. S. C. A. Title 49, Section 15(3), and still be an interurban railroad and it may be engaged in the general transportation of freight (U. S. C. A. Title 49, Section 1(4) and still be an interurban, and if it may engage in the general transportation of freight, without limitation as to its character, and none is placed in the Act, a considerable or any portion of such transportation may be interstate.[12]

If notwithstanding such an express determination by Congress that an interurban railroad may be such, irrespective of the amount, the character, or its manner of handling freight, or its relationship to its passenger business, then the Interstate Commerce Commission can take the fact with relationship to its freight business of any particular railroad, as it has done as to this railroad and others, and determine

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[12] In the Act here in question, it is provided that an electric interurban railroad may be part of a general steam-railroad system of transportation and, of course the converse is true, it may be engaged in the general transportation of freight and not be a part of a steam railroad system.

because thereof it is not an interurban railroad, though
of a change with respect to its freight business it
be an interurban, and later, though one fact may be
determinative as to this interurban railroad and
to another, and today this fact may be determina-
and tomorrow another, in the case of the same railroad,
we say one of two conclusions irresistibly follows, that
a determination is contrary to and against law, or that,
claimed by the Commission in its reports to Congress,
is no such fixed definition of the term "electric inter-
railroad" that by the use of it any standard or yard-
is furnished by Congress to the Interstate Commerce
mission by which to determine the matter, and that by
ferring the Commission to determine it without having
such a standard, Congress has, to use the language of
Justice Hughes, transcended "the limitations of author-
to delegate, if our constitutional system is to be main-
ed," or to use the language of Justice Cardoza, such dele-
ed power to the Commission is "not canalized within
nks that keep it from overflowing," and "it is unconfined
l vagrant." *Schechter vs. United States*, 295 *U. S.* 495.
pecially do we say that if in this case the respondent's
of railroad, built as an interurban railroad and never
anged, can by the finding of the Commission be transformed,
ely because by the development of another type of trans-
rtation it has lost a portion of its passenger business,
en a large portion, from an interurban railroad into a
ilroad of the type of a steam railroad, then its constitutional
ghts have been invaded by an unconstitutional delegation of
gislative power.

III

The finding by the Commission that respondent is not an interurban is not in any wise binding upon the Court.

We have so far assumed that the trial court had a right dependently of the Commission to determine whether or ot the respondent is an interurban railroad, and we have own that the determination that it is an interurban railroad amply sustained by the evidence. However, the right of e trial court to make such a determination is challenged petitioners in this court for the first time upon a ground

never before asserted in the course of this case, namely, that the determination by the Commission is final, having been made after a hearing. (Brief, p. 37.) Heretofore it has been conceded by the petitioners that if the determination of the Commission is arbitrary, unreasonable, or not based upon sufficient evidence, it is not binding upon the courts. (See petitioners' pleading, R. 36.) They concede that even the cases they cite show also that it is not binding if it is contrary to and against law, and we think we have shown that it was, and likewise that it is necessarily arbitrary and not supported by the evidence. If the trial court was right in this, and we have shown that it was, then of course the trial court was likewise correct in its finding that respondent is an interurban railroad, and the judgment should be affirmed, unless this new proposition of petitioners is sustained, namely, that the determination by the Commission is binding upon the courts, whatever its character, whether it is arbitrary, capricious, not supported by substantial evidence, or contrary to or against law.

On the contrary, it is our position that the determination by the Commission is not binding absolutely as now argued by petitioners, or even to the limited extent heretofore contended for by them, but that the trial court had the right to try the status of the respondent as to being an interurban railroad independently of any finding by the Commission.

As frequently happens, the manner in which questions arise in a law suit is lost sight of in the course of arguing the questions involved. So it is here. Opposing counsel lose sight as to how the question as to the status of the respondent arises. Under the Railway Labor Act, the Interstate Commerce Commission only makes a finding, it does not, it is not even authorized to issue any order, and there is no order to attack, (*Shannahan vs. United States*, 303 *U. S.* 596), so that the provisions of the Interstate Commerce Act as to how orders of the Commission shall be reviewed are not applicable, nor would there ever be any reason for respondent to attack a finding of the Commission as such, for as a result of the finding itself it suffers no injury. But the Mediation Board has taken the position that respondent is not exempt from the Railway Labor Act and has ordered respondent to comply with its provisions, and respondent has failed and

refused. In consequence the United States District Attorney has threatened to prosecute respondent and its officers for that failure and refusal. This suit is to enjoin such prosecutions.

It is conceded that respondent was entitled to maintain the suit, because the irreparable injury and damage to it if compelled to act under the law is admitted—and therefore neither that, nor the evidence as to that, is in question here, so that the sole question is whether the court in such a suit is bound by the finding of the Commission that respondent is not an interurban electric railroad, either absolutely or within the limitations heretofore set out, or rather whether, if criminal actions were brought, would the court or the jury in such actions be precluded from determining independently the status of the respondent as to being an electric interurban railroad, or could it only determine whether the Commission had so found, or if it had so found, the finding of the Commission was arbitrary, not supported by the evidence or against law, and only in the event that it so determined could it *de novo* determine respondent's status?

In considering this question, it is to be borne in mind that at the same time the Railway Labor Act was enacted, three different statutes, to be administered by separate agencies, were enacted, the Railway Labor Act to be administered by the Mediation Board, the Railroad Retirement Act to be administered by the Railroad Retirement Board, and the Carriers Taxing Act to be administered by the Collector of Internal Revenue. Each contained precisely the same provisos excluding interurban railroads. The obvious reason for authorizing the Interstate Commerce Commission to determine whether an interurban railroad is exempted under the Act is that in the first instance these various agencies should not make different determinations with respect to the same railroad, which might well happen if each were to make the determination under the proviso itself, but it cannot be argued therefrom that there was any intention on the part of Congress to deprive the particular railroad of having its day in court to have its status passed upon by the courts in an appropriate case, else Congress would have said so. It is significant, indeed, that the Congress did not even specifically say that the determination by the

Interstate Commerce Commission would be binding on the three agencies operating under the three acts named, as it had specifically said in the Railway Mail Pay Act, which vested authority in the Commission to determine the rates of pay to railroads for carrying mail, and also provided that the Postmaster General should pay the rates of pay so determined. (U. S. C. A., Title 39, sections 541-566, especially 551.)

In petitioners' brief (p. 47), the statement is made that "When the Congress chose the Commission to make the determination, the inescapable inference is that it approved the principles which the Commission had followed in such cases." Why counsel should say that such conclusion follows we cannot conceive, because under the 1920 Act the Railway Labor Board had held that the extent of its freight revenues did not prevent a railroad from being an interurban, and yet neither at that time nor at any time thereafter was any complaint made of that decision. On the contrary, it was acquiesced in by everybody concerned. (Decision 33, R. 109.) Congress, then, presumably had before it knowledge of the Board's decision, when it enacted the Railway Labor Act of 1934, the one here in question. It likewise had knowledge of the insistent recommendations of the Interstate Commerce Commission that the exclusion provisions of the Interstate Commerce Act be changed, so as not to exempt electric interurban railroads engaged in the transportation of freight, and yet the exemption provision placed by Congress in the 1934 Act, so far as we are here concerned, is precisely like the one in the 1920 and 1926 Acts. How, then, can it be said that Congress intended that the term "interurban" should have the meaning ascribed to that term by the Commission, and that its interpretation should be binding on the courts; that it should have the effect of amending the law, notwithstanding the refusal of Congress to amend it? On the contrary, Congress had a right to assume that the Commission would not change the meaning of the term "interurban" in the teeth of the refusal of Congress to adopt the change suggested to it by the Commission.

Moreover, it is further significant that of the three Acts above referred to, the first Railroad Retirement Act and the Carriers Taxing Act were held to be unconstitutional

by the Supreme Court, and a new Railroad Retirement Act and a new Carriers Taxing Act were passed in June, 1937, and this was many months after the trial court in this case had granted the injunction and had squarely held against the test for determining what is an interurban, adopted in its later decisions by the Commission, notwithstanding the refusal of Congress to adopt the Commission's test, and had asserted the court's authority, notwithstanding the finding by the Commission, independently to determine the status of respondent as an interurban. Moreover, these new laws were enacted more than a year after a similar ruling had been made in the Texas Electric Railway case by the Federal District Court at Dallas, Texas, and yet precisely the same exclusion provisions as to interurbans were contained in these new laws as in the old ones. If Congress had intended either that the test advocated by the Commission in determining the question should be adopted, or that the determination of the Commission should be to any extent binding on the courts, it could easily have said so. At least the executive department of the Government, and the Interstate Commerce Commission, interested parties to this litigation in both courts, apparently made no effort to have the law changed, or if they did, Congress did not heed their efforts.

Petitioners have heretofore suggested (Petition for writ of certiorari, p. 14), that the effect of the court granting a trial *de novo* in such cases as this has resulted in paralysis of the plan established by Congress for the determination of which electric railroads are subject to the Railway Labor Act. Why? Why is the Government so alarmed that the citizen shall have his day in court, when an administrative body has determined his status to be different than he had ever conceived it to be? The same evidence can be introduced. Why should the Government fear to have the matter determined in court, unless it fears that its determination by the administrative body will not stand the light of day in a court of justice? But the Government should not only have no such fear of the courts, it should welcome an independent determination of the matter therein. If the finding of the administrative body is right, then presumably the court will on the same evidence introduced before it make the same finding. If not,

in a matter not merely regulating its business, but actually determining its status, the Government instead of resisting should welcome the determination by the court of the claim of the railroad company as a citizen that the administrative body had misconceived its status, to its disadvantage.

In support of the contention that the determination by the Commission of the status of respondent as to being or not being an interurban railroad is binding upon the Courts, petitioners argue that by virtue of the proviso the Commission, acting outside its regulatory capacity, is only authorized to determine a question of fact for the other executive agencies acting under the Railway Labor Act and the other Acts above referred to, and that such a finding of fact is not subject to review by the Courts. But the difficulty with the conclusion thus arrived at is that the determination of whether a particular railroad is an interurban railroad involves more than a mere question of fact. It involves, first, the meaning of the term as used in the Act, and, second, the determination as to whether the particular railroad is an interurban in accordance with that meaning. In other words, both a question of law and fact.

Moreover, the cases upon which petitioners rely do not support the proposition stated by petitioners. One case, *Great Northern Ry. Co. vs. United States*, 277 *U. S.* 172, decides no more than that the question decided in the other case (*Butte, Anaconda & Pacific Railway Company vs. United States*, 290 *U. S.* 127) was not properly brought in a three judge Court. The other case, *Butte, Anaconda & Pacific Railway Co. vs. United States, supra*, held that money paid by the United States to a railroad company pursuant to a certificate of the Interstate Commerce Commission under the provisions of Section 204 of the Transportation Act for the reimbursement of carriers operating their own lines may not be recovered back by the United States. The reason for the decision is that such section of the Act granted a bounty to those carriers coming within its purview, and Congress vested in the Interstate Commerce Commission the determination as to which carriers were entitled to the bounty and the amount thereof, which sum was to be paid by the Treasurer of the United States in accordance with a certificate or certificates issued by the Commission. Money had been

so paid to the Butte, Anaconda & Pacific Railroad and the United States sought to recover a portion of it back, because the Commission had subsequently to the issuing of the certificate determined that its first determination of the amount of the bounty to be donated to the carrier was incorrect. This Court denied recovery, because the determination made originally was binding alike upon the Government and upon the carrier; and not subject to review by the Courts. The case went further than is stated by petitioners, and held that neither questions of fact or of law arising in the determination by the Commission in that case could be reviewed by the Courts. This situation is clearly distinguishable from that involved herein. The Congress in the distribution of the bounty could have itself determined who should be the recipients thereof, or could choose any agency it pleased to determine that matter, and the Act contemplates, indeed provides such decision to be final; and it being wholly a matter between the Government and its citizens claiming to come within the purview of the statute granting the bounty, it does not constitute a matter for judicial cognizance. Such case is comparable to the cases relating to regulations of the executive departments which will later be referred to in this brief. By virtue of the statute here involved, if respondent comes within the Act certain duties and obligations are placed upon it. Such was not the case in the statute involved in the Butte case, *supra*. These duties and obligations respondent must perform if within the Act, or, failing to do so, it subjects itself to prosecutions in the Courts. It cannot be conceived, inasmuch as the statute here involved contemplates court proceedings, that Congress intended to make an administrative tribunal's determination binding upon the Courts in such proceedings, even though it could do so without violating the carrier's constitutional rights—a subject which has been and will later be considered in this brief.

Petitioners concede that even under this newly discovered theory that the determination by the Commission as to the status of respondent being conclusive upon the Courts that the Courts could determine whether "the decision was based upon evidence introduced at the hearing or whether the necessary requisites of a fair hearing were lacking." The line of demarcation, as thus stated, between this new proposition

and the contentions made by petitioners throughout the course of this case is slight, because if the Commission in arriving at its determination used as the only determinative test one which was not relevant, as it did when it held that the sole determinative factor is the relationship of respondent's freight business to its passenger business, respondent did not have a fair hearing, and the decision is as if based upon no evidence at all. Likewise it was arbitrary and against law.

It is obvious that petitioners do not greatly rely upon this new proposition, but, as they say, rely primarily upon the proposition that the determination by the Commission is binding upon the Courts unless arbitrary, capricious, or not based upon substantial evidence.

Petitioners cite a number of cases which they claim support the proposition that the determination of the Commission is binding upon the Courts unless arbitrary, capricious or not supported by substantial evidence. (Note 6, Page 19, of petitioners' brief.) In each of the cases cited, however, it will be found that the statute provided the effect which the decision of the Interstate Commerce Commission, in litigation based upon such decision, had upon the scope of review by the Courts. It is not our contention that the Congress may not limit the right of review in cases involving civil liabilities or civil rights by providing that the decision of any administrative body shall, in a proceeding before the Courts, have a certain effect, but we say that Congress did not do so in this statute, and, not having done so, it has no effect, and the Courts have a right to determine the issues of law and of fact as in any other case. All of the cases cited upon this point involved suits brought to restrain or set aside orders of the Commission purporting to have been made pursuant to the authority vested in it by the Interstate Commerce Act. But Congress, by express enactment, has provided the effect to be given to an order of the Commission, because it has said (Section 16(12) of the Interstate Commerce Act) that in a suit for the enforcement of the order the sole question for review is whether it was "regularly made and duly served," and of course in an action to restrain its enforcement the same effect must be given it. This accounts for the language quoted by petitioners in their brief at Page

) from *Virginian Ry. Co. vs. United States*, 272 *U. S.* 658, it it is not applicable herein where no such effect is given the Railway Labor Act to the determination by the ommission. It also explains the language quoted by petiioners from *United States vs. Louisville & Nashville R. R. o.*, 235 *U. S.* 314. In that case the Court said:

> "And the amendments by which it came to pass that the findings of the Commission were made not merely prima facie but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, supra, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below."

he limitations referred to in the foregoing opinion are found the case of *Interstate Commerce Commission vs. Louisville Nashville R. R. Co.*, 227 *U. S.* 88, which is one of the cases hich the Court in the foregoing opinion expressly referred . In this latter case the Court said:

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was

> inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing cases), or if the facts found do not, as a matter of law, support the order made (citing cases)."
>
> "* * * * * But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power."

As pointed out in the foregoing quotations, the statute therein involved made the findings of the Commission conclusively correct in case of judicial review, except to the extent pointed out. And yet with full knowledge of the fact that it had been necessary, in order to give any effect of conclusiveness to the Commission's findings under other statutes, so to expressly provide, Congress, in enacting the Railway Labor Act, did not provide that the determination of the Interstate Commerce Commission, as to whether or not a particular railway came within the Act, was conclusive upon the Courts to any extent. It is obvious, from this failure on the part of Congress so to make the determination of the Commission binding, that it did not intend that it should be.

The case of *Swayne & Hoyt, Ltd. vs. United States*, 300 *U. S.* 297, cited in note 7, page 19, of petitioners' brief, arose under the Shipping Act. That Act contains the provision, U. S. C. A., Title 46, section 828, that if the court determines the order of the board to have been "regularly made" and duly issued, it shall enforce obedience there .

The cases of *St. Joseph Stock Yards Co. vs. United States*, 298 *U. S.* 38, *Acker vs. United States*, 298 *U. S.* 426, and *Morgan vs. United States*, 298 *U. S.* 468, cited in the same note, are cases arising under the Packers and Stockyards Act. Again we find a provision in the Packers and Stockyards Act relating to enforcement of the Secretary's orders and findings. It is U. S. C. A., Title 7, section 216, and reads as follows:

> "* * * If after hearing the (district) court determines that the order (of the Secretary) was lawfully made and duly served and that such person is

in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives, from further disobedience to such order, or to enjoin upon him or them obedience to the same."

It may therefore be said that the Supreme Court has never held that a finding or order of an *administrative body* is conclusive upon the courts, if based upon substantial evidence, is not arbitrary, or contrary to and against law, except in those cases arising under statutory provisions, which expressly limit the courts' right of review. There is, however, a line of cases, claimed by petitioners to sustain their contention, of which the cases of *Houston vs. St. Louis Independent Packing Co.*, 249 *U. S.* 479, *Decatur vs. Paulding*, 14 *Pet.* 497, *Bates & Guild Co. vs. Payne*, 194 *U. S.* 106, *Riverside Oil Co. vs. Hitchcock* 190 *U. S.* 316, and *Tang Tun vs. Edsell*, 223 *U. S.* 673, which cases are referred to at page 19, note 7, petitioners' brief, are examples. These cases hold that regulations of an *executive department* will not be disturbed, if made in conformity with law, except within the limitations hereinbefore set out. There is a reason for such holding which is apparent, and which is not applicable to the case at bar. U. S. C. A., Title 5, section 22, provides as follows:

"The head of each executive department is authorized to prescribe regulations, not inconsistent with law, for the government of his department * * * ."

The executive departments in such statute referred to are defined in Section 2 of the same title, as being the departments under the control of the members of the President's cabinet. So when the provision refers to "the head of each executive department," it refers to the various cabinet members. The courts, in a long line of cases, have held that such a regulation by the head of an executive department, when not inconsistent with law, has the force of a law (*Caha vs. United States*, 152 *U. S.* 221; *Ex parte Reed*, 100 *U. S.* 13), and that a regulation by an executive department head, in conformity to a particular act of Congress, becomes a part of the law, and of as binding force as if incorporated

in the body of the law itself. *Wilkins vs. United States*, 96 *Fed.* 839, *United States vs. Sibray*, 178 *Fed.* 144, *United States vs. Barrows*, 1 *Abb. U. S.* 351, *In re Aliens*, 231 *Fed.* 335, *Peterson vs. United States*, 287 *Fed.* 17. It may appear to the casual reader that the statute herein referred to applies only to the relation existing between the executive head and his immediate employes, but an examination of the cases herein cited discloses that such is not the case. The courts have interpreted such statutory provision as applying to the enforcement and operation of laws of Congress, the enforcement and operation of which is directed to a particular executive department. Thus the regulations of the Secretary of Agriculture made in conformity with the Meat Inspection Act are given the force of law and become a part of the law, as if incorporated in the Meat Inspection Act itself. With this in mind, let us turn for example to a consideration of the case of *Houston vs. St. Louis Independent Packing Co.*, 249 *U. S.* 479, relied upon by petitioners. In that case, pursuant to the authority given him by the Meat Inspection Act, the Secretary of Agriculture made a regulation as to what could be called sausage, and ruled that if the product contained more than five per cent cereal and water, it could not be labeled sausage, as the name was deceptive of the product. This was a regulation by the head of an executive department, and under the law and the interpretation heretofore given it by the courts, this regulation became as much a part of the Meat Inspection Act as though incorporated in the Act by Congress itself. As such regulation has the force of law, the courts of course cannot inquire into the facts upon which the Secretary based his regulation, except within the limitations hereinbefore set out. As stated by Justice Clark:

> "* * * and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it."

It might be parenthetically noted that there is another distinction between the determination of the Secretary of Agriculture as to what is sausage, and the determination of the Interstate Commerce Commission as to what is an interurban. In the former, Congress had never manifested its

conclusion that a product might contain more than five per cent cereal and water and still be sausage, while in the latter, Congress on numerous occasions has determined that a carrier might obtain more than fifty per cent of its operating revenue from freight traffic and still be an interurban. In other words, Congress had never legislated on the subject as to what might be sausage, while it has legislated as to what might be an interurban. The courts have consistently held that regulations must be consistent with law, and that they may not be extended so as to alter, amend, or defeat a law already enacted by Congress. (*Morrill vs. Jones*, 106 *U. S.* 466, *Campbell vs. United States*, 107 *U. S.* 407, *Williamson vs. United States*, 207 *U. S.* 425, *United States vs. Symonds*, 120 *U. S.* 46, *Sherlock vs. United States*, 43 *C. Cl.* 161), and that a regulation may supplement a statute, but cannot supersede it, (*Roberts vs. United States*, 44 *C. Cl.* 411). So here the Commission cannot find that an interurban electric railway is not that which Congress has already expressly said that it is. Congress, as we have heretofore shown, has expressly stated that an interurban railway may still be an interurban notwithstanding the relation of the quantity of its freight business to its passenger business or the revenue derived from freight business as compared with passenger business. Therefore, a finding by the Commission that respondent is not an interurban, because it engages in interstate freight traffic and because a large portion of its operating revenue is derived from freight traffic, is a finding that seeks to supersede and defeat legislative enactments on the same subject matter.

The origin of the doctrine that discretionary regulations by the heads of executive departments will not be reviewed by the courts, when supported by substantial evidence, is found in the case of *Kendell vs. United States*, 12 *Peters*, 524. In that case, the court pointed out the distinction between reviewing a purely ministerial act, and a duty imposed upon the head of an executive department, in which judgment and discretion are to be exercised. The former is subject to review, the latter is not.

See also the case of *Decatur vs. Paulding*, 14 *Pet.* 497, cited at page 19, note 7, of petitioners' brief. Therein the court said:

"We have referred to these passages in the opinion given by the court in the case of *Kendall* vs. *United States*, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as head of such department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court in relation to the power of the Circuit Court to issue the mandamus. But there was no difference of opinion respecting the act to be done. The court was unanimously of opinion that in its character the act was ministerial. In the case before us, it is clearly otherwise; and the resolution in favor of Mrs. Decatur imposed a duty upon the Secretary of Navy, which required the exercise of judgment and discretion; and in such a case the Circuit Court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided in him."

The basis for the distinction is found in the elementary foundations of our form of government—that there are three distinct and separate branches thereof, the Executive, the Legislative, and the Judicial—and that there can be no conflict in the powers exercised by each. When the head of an executive department is vested with authority to make regulations, there is necessarily, from the nature of our governmental system, implied the limitations upon the power of the courts to review his exercise of that authority. In the case of *Houston vs. St. Joseph Independent Packing Co.*, supra, the head of an executive department was charged with the duty of making regulations which required the exercise of judgment and discretion—a duty that was executive in character—the court very properly refused to review the exercise of such judgment and discretion.

But there is an important distinction between the finding of an administrative board, such as the Interstate Commerce Commission, even though it requires the exercise of judgment and discretion, and a regulation made by the head

of an executive department, which requires the exercise of judgment and discretion. The latter have been held by the courts to have the "force of laws"; the former have never been so held.

So, while the courts have consistently refused to review the exercise of judgment by the heads of executive departments, no case has come to our attention in which the court has refused to try de novo the findings or orders of administrative boards, except in those cases in which there was special statutory limitation on the court's right of review. Such statutory limitation is lacking in the Railway Labor Act; and indeed the fact that in all the statutes cited Congress has deemed it necessary expressly to limit the authority of the courts, and yet did not do so in the Railway Labor Act, clearly evidences that Congress did not intend to so limit the courts' authority, and there is good reason for the difference, it is the difference between the mere regulation of a citizen's business and the determination of his actual status.

Having disposed of the cases cited by petitioners claimed by them to be contrary, we proceed to show why it was and is our contention that it was the right and duty of the court independently to determine whether or not the respondent is an electric interurban railroad not subject to the act. First. If the criminal prosecutions which had been threatened had actually been brought, there would be two questions for the court, or the court and jury to determine. First, whether or not the respondent is a carrier subject to the act, and secondly, if it should be held that it is, then, whether or not it had posted the notices as required by the act, both questions being essential to the determination of respondent's guilt, and there being no dispute but that the respondent had failed to post the notices, there would be only the first question to determine. Inasmuch as this suit is brought to prevent such prosecutions, there is left only the first question, and obviously that question must be determined upon the same basis as it would be determined in the criminal action. It will be observed from a reading of the provisions of the act that the authority and duty of the District Attorney to prosecute is not dependent upon any action or determination by any administrative body or tribunal; he could pro-

ceed to prosecute even if no such determination had been made; and, therefore, necessarily the determination whether or not respondent is a carrier within the act, both in the threatened criminal actions and in this suit to prevent them, must be an independent determination. Moreover, if it were held otherwise, the respondent would be deprived of its constitutional rights guaranteed under the Fifth and Sixth Amendments of the Constitution of the United States, for if an administrative tribunal is empowered to determine one of the elements necessary to constitute the criminal offense in a proceeding in no way connected with the action in which the guilt of the accused is to be determined, and that determination is to be conclusive on the accused in his trial, then and by virtue of that fact his constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States have been taken from him, and the same rule with respect to this matter must be followed in a suit to enjoin a criminal prosecution as in the criminal prosecution itself. Therefore it is the contention of the respondent, that as one of the elements of his guilt cannot be determined against him in a proceeding other than that in which his guilt or innocence is being determined, one of the elements necessary to prosecution under the act, to wit, respondent's status as a carrier within the act, cannot be determined against him in a proceeding other than that in which his injunctive relief is being sought.

For the first time in this case the contention is now made that the determination of the Interstate Commerce Commission is binding no matter how arbitrary, capricious, or without substantial evidence to support it such determination may be. The mere statement of the claim is its own refutation, for it cannot be under our American system, that in a criminal action in which the liberty and property of the citizen is in jeopardy, the status of the citizen, which is the only issue in the case, is determined, not by evidence produced against him at the trial, but by the determination of an administrative body, which in this case is the Interstate Commerce Commission, and there is nothing left, if that determination is final, but for the court to pronounce judgment against him. While not quite so shocking, the claim that the determination by the Interstate

Commerce Commission is binding unless arbitrary, capricious, or contrary to law is also untenable, because it has the effect, though less drastically, of depriving respondent of its constitutional rights.

Second. The Circuit Court of Appeals, speaking through Judges Lewis and Williams, interpreted the authority given to the Comm. sion under the Act as being limited to a determination as to whether electric lines are operating as a part, or are a part, of a or the general-steam railroad system of transportation. The petitioners in their brief (Page 22) take issue with this interpretation of the extent of the Commission's authority, and declare that if the Commission is to determine which electric lines fall within the terms of the proviso, it must first determine whether such electric lines are street, suburban or interurban. In making this declaration, petitioners misconstrue the general office of a proviso and the effect of this particular proviso. In *Deitch vs. Staub* (*6th Cir.*), 115 *Fed.* 309, Circuit Judge Lurton, later one of the Justices of this Court, said:

> "* * * * * * The primary and usual office of a proviso is to except something out of a statute which would otherwise be within it. Its use is to take special instances out of a general class. Suth. St. Const. Section 222, 223; *Gibbons vs. Ogden*, 9 *Wheat.* 191, 6 *L. Ed.* 23. * * * * *"

This is undoubtedly a correct interpretation of the general purpose of a proviso, that is, to take special instances out of a general class; in other words, an exception clause. In the Railway Labor Act street, interurban or suburban electric railways are, as a general class, not subject to the Act. It is only in special instances that such electric railways become subject to the Act—when they are operating as a part, or are a part, of a or the general steam-railroad system of transportation. The proviso, therefore, removes from the general class of excluded electric railways those that are operating as a part, or are a part, of a or the general steam-railroad system of transportation. In other words, certain types of the general class of excluded railroads are included within the Act by the proviso, and Congress, in granting to the Commission authority to determine which electric

lines fall within the terms of the proviso, did not confer upon the Commission the authority to determine which electric lines are excluded from the Act, but only to determine which of the general class of excluded railways are included within the Act by the proviso. Street, suburban and interurban electric railways being the general class excluded by the Act, the authority of the Commission is to determine which of the various street, suburban and interurban electric railways come within the terms of the proviso.

As Circuit Judge Williams succinctly stated the matter:

> "The inclusion of 'any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power' and the confining of the Interstate Commerce Commission to determine 'after hearing' as to whether 'any line operated by electric power falls within the terms of this proviso,' restricts the Commission to the determination whether the Utah Idaho Central Railroad Company, a street, interurban or suburban electric railway, was operated as a part of a general steam-railroad system of transportation."

It was and is conceded that the Utah-Idaho Central Railroad was not and is not a part of a or the general steam-railroad system of transportation, and this concession by the Commission left nothing for it to determine, for by the express terms of the Act its authority was limited to the determination of that which it had conceded.

Third. The Congress has not manifested its intention that the determination of the Interstate Commerce Commission shall be binding upon the courts, even if it was not arbitrary, or capricious, or if not supported by substantial evidence. No case is cited by petitioners which holds that in a criminal case the finding of any administrative body is binding upon the court, and, as heretofore pointed out, in the very nature of things, no such holding could be made, nor any case which holds that in a suit to restrain prosecutions under a criminal statute any finding of an administrative tribunal as to the status of the respondent is binding in any way upon the court.

Petitioners do, however, on page 37 of their brief, in commenting on respondent's claim that the Fifth and Sixth Amendments of the Constitution are violated if the Commission's finding of respondent's status is binding in this type of action, make the bald assertion that "this is plainly not the law," and in support of that assertion they cite two cases, *United States vs. Grimaud*, 220 *U. S.* 506, and *Houston vs. St. Louis Independent Packing Company*, 249 *U. S.* 479. No valid reason is apparent to respondent why petitioners cite these two cases in support of their contention that "this is plainly not the law," because those two cases do not support the statement, nor do they have any bearing thereon. In the first of the two cases, the defendants demurred to an indictment charging them with grazing sheep on the Sierra Forest Reserve without a permit as required by the regulations adopted by the Secretary of Agriculture upon the ground that the forest reserve act was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations, and made violations thereof a penal offense. All this Court held in that case was that the act was constitutional, not that all of the elements going to make up the crime would not have to be found by the Court or jury in the trial. The second case above cited decides nothing more than that a regulation by the Secretary of Agriculture that sausage containing more than 5 per cent cereal and water could not be labeled such as it was deceptive of the product, would not be reviewed by the court. This case is fully considered by respondent elsewhere in this brief.

The following language from petitioners' brief (page 29) is particularly interesting:

> "Deliberately omitted from that list of authorities were cases arising under such statutes as the Federal Trade Commission Act and the National Labor Relations Act, which provide specifically that the findings of the administrative body shall be conclusive if supported by evidence."

The inclusion of such provisions in those two acts conclusively demonstrates that Congress recognizes that the findings of administrative bodies are not binding upon the Courts unless the statute expressly so makes them, and where it

is the desire and intention of Congress that such findings shall be conclusive upon the Courts it has expressly so provided in the various statutes. But, on the contrary, in the Railway Labor Act, the Congress, for the reasons hereinbefore stated, has clearly manifested its intention that the determination by the Commission should be in no wise binding upon the Courts.

An examination of the details of the Railway Labor Act itself will further disclose that it could not have been the intention of Congress to bring the respondent within its terms. For instance, the National Railroad Adjustment Board shall "consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen of whom by such labor organizations of the employees national in scope, as have been or may be organized in accordance with the provisions of section 152 of this Chapter." (Section 3, First (a).) Obviously, the Congress could not have intended that respondent, whose service in the territory served is primarily local, not only in its passenger, but in its freight service, a carrier not a part of any steam railroad system of transportation, much less a part of the general steam railroad system even in its broadest sense, a carrier not even considered necessary to the operations of the Government in time of war so as to come within the Federal Control Act, should be subject to the same regulations as to the employment of its employes as that applicable to the major carriers which do form a part of the general steam transportation system of the country (using that term in its broadest sense) and under a plan or scheme, in which neither its voice or the voice of its employes would be in any wise vocal, and especially when, as shown here, prior to the enactment of the law, its employes were never organized in any union or brotherhood of railroad employes "national in scope," but were organized as a local unit of a union distinct and separate, and with which it had never had any labor disputes.

Fourth. That in the absence of express limitations, the courts have authority to try de novo the question as to the status of the respondent, without regard to the finding by any administrative body, is no longer an open question, because in a series of cases precisely analagous this court has so held.

The petitioners, at page 24 of their brief, concede that in the cases of *Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission, supra,* and *United States vs. Chicago North Shore & Milwaukee R. Co., supra,* this court decided for itself independently whether particular carriers were interurban railways, and in the case of *United States vs. Idaho,* 298 *U. S.* 105, this court decided the analagous question of whether a particular line constituted a spur track. It is claimed, however, that these cases are not applicable to the case at bar, for the reason that the provisions of the Interstate Commerce Act under which they arose did not specifically authorize the Commission to make the determination as to which carrier fell within their terms, and that is the only contention made as to the inapplicability of these cases to the matter in issue herein. Such contention is obviously based upon an erroneous interpretation of the provisions of the Act. The Piedmont case arose under the provisions of the Transportation Act, requiring that a certificate of convenience and necessity be obtained by a carrier subject to the provisions of the Act from the Interstate Commerce Commission, before embarking upon any extension of its lines. As heretofore pointed out, the Act specifically exempted from the provisions street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam-railroad system of transportation. The Piedmont & Northern Ry. Co. made application to the Commission for such a certificate, such application being made without prejudice to its making claim that it was exempt as an interurban. The Commission found the railway not an interurban, overruled the claim of exemption, and denied the certificate upon the merits. Thereafter, the Piedmont commenced construction of the extensions and the Commission brought injunctive proceedings in the District Court, alleging that the construction was illegal, as no certificate had been obtained. The railway defended upon the ground that it was an interurban. The trial court over-ruled the defense and enjoined the construction, until a certificate had been obtained from the Commission. The railway appealed to the Circuit Court, but this court granted certiorari prior to the hearing by the Circuit Court.

The Act gave the Commission the exclusive power to issue such certificates, but was silent with respect to its

authority to determine what carriers were subject to the Act. It is obvious, however, that while the Act is silent as to that, it nevertheless granted such authority to the Commission as effectively as if the grant had been in express words. The Act excluded certain types of interurbans (those operated as a part of a general steam-railroad system of transportation) from its operations. Under it, when the railway made application for a certificate, the Commission first had to determine if the railway came within the Act. Inasmuch as it was necessary to make this determination as preliminary to the determination as to whether to issue the certificate, the authority must be read into the statute as conclusively as though it was therein expressly stated.

The same is true of the case of *United States vs. Idaho*, supra, wherein the railroad applied for a certificate for the abandonment of a line of track. Under the Act, there could be abandonment of the line if it was a spur, so again it was necessary for the Commission to determine the preliminary question as to whether the line was a spur, before proceeding to hear the application for abandonment on the merits. As it was essential that this preliminary question be first disposed of, before the Commission could proceed to exercise the power expressly granted, the power to determine such preliminary matter must be read into the express grant to the Commission.

The case of the *United States vs. Chicago, North Shore & Milwaukee R. Co., supra,* arose under Section 20a of the Transportation Act, and required all carriers to obtain a permit from the Interstate Commerce Commission before issuing any securities, but specifically exempted interurban, street, or suburban railways, which are not operated as a part of a general steam-railroad system, from the requirement. Action was brought by the Commission to enjoin the railroad from issuing securities, without first having obtained from the Commission an order permitting it so to do. Here again, the authority of the Commission to determine whether the particular carrier was an interurban exempt from the Act was not expressly given, but again it was necessary for the Commission to pass upon that question before passing upon the application for a permit on the merits. So such authority was by the Act, by necessary implication,

conferred upon the Commission, though not expressly so stated in the Act.

There is no difference in the situation under the Railway Labor Act, notwithstanding the contentions of petitioners to the contrary. They say that there is, because the status of the railroad is determined under that Act by an independent administrative body, to wit, the Interstate Commerce Commission, rather than by the body administering the Act, to wit, the Mediation Board. From this they draw the conclusion that if determination were by the Mediation Board, it would be subject to review by the courts, as it was when the Interstate Commerce Commission decided its own jurisdiction in the Piedmont, North Shore and Idaho cases. The inference is that when an administrative body determines its own jurisdiction, it is conclusively presumed to be prejudiced in making such determination and therefore subject to review, whereas if the determination is by an independent administrative body it is not and therefore binding. There is, however, no basis for any such presumption. The first question every tribunal has to determine is whether it has jurisdiction to determine the cause. This, we undertake to say, is the first time it has even been suggested that the question as to the tribunal's jurisdiction to determine the matter before it should be determined by an independent tribunal, which would then be binding upon it.

Moreover, it is not made mandatory by the Railway Labor Act that the Interstate Commerce Commission determine the status of an electric line as to being within the Act. It must do so on request either of the Mediation Board or upon complaint of any party interested. Suppose no request is made. Then the Mediation Board must determine the matter. Then petitioners concede that determination would be subject to review. So that we have this anomalous situation, that if the determination is made by the Mediation Board (there having been no request for any determination to the Interstate Commerce Commission) that a particular railroad is not an interurban railroad, that decision is subject to review. But if, as to another railroad, a request has been made to the Interstate Commerce Commission, and as a result of such request it has determined the railroad's status as to being an interurban railroad, that determination

is binding. This is a complete refutation of petitioners' argument that the respondent herein has sought collaterally to attack the determination of the Commission. It is no more a collateral attack in this case than was the attack made in the Idaho, North Shore and Piedmont cases.

Finally, the contention of petitioners can be reduced to an absurdity, if there are enough administrative bodies to determine all the questions of fact in the matter, and if not, enough could be created. Here there are, as we have pointed out, only two questions before the court, if the District Attorney should bring the prosecution under the Act, (1) Is respondent a carrier within the Act? and (2) Has it failed to post the notice required thereby? Petitioners say that the first has been determined by an independent administrative body and that determination is binding on the court. Then let the other be determined either by the same independent administrative body or some other. Then all the court would have to do would be to instruct the jury that it was their duty to find the carrier guilty.

Fifth. The question as to whether an electric line is a carrier within the Act is a mixed question of law and fact in any particular case, because the first question in the matter which must be decided is: "What is the meaning of the term 'interurban' as used by the Congress in enacting the statute?" and comes squarely within the principle announced by this court through Justice Brandeis in the Idaho case, wherein he says: "Whether certain trackage is a 'spur' is a mixed question of fact and law, left by Congress to the decision by a court—not to the determination of either a federal or a state commission." Surely, if the determination as to whether certain trackage constitutes a spur is a mixed question of law and fact, then the question of whether an electric railroad is an interurban certainly is.

That this is so is emphasized by the present situation. Since this case was tried, the Social Security Act has been enacted, and it is certain that the respondent comes within one or the other of the two Acts, the Railroad Retirement Act, which contains precisely the same proviso as the Railway Labor Act, or the Social Security Act, so that necessarily there is involved herein the determination as to which of these Acts the respondent is under, for if it is under the

ilway Labor Act it is necessarily under the Railroad Re-ement Act, and if it is not, then it is under the Social curity Act, and the respondent is in the position of being bject to the separate demands of the agency administering ch Act that it comply therewith. The question as to which t is applicable to respondent, the more burdensome Railroad tirement Act, or the less burdensome Social Security Act, pends upon the meaning of the term "interurban" as ed by Congress, and if the respondent is held not to be an terurban railroad, the consequence is that it has also to bear e burdens of the Railway Labor Act, which it is conceded cannot bear and continue to exist.

Surely the determination as to which Federal Statute verns respondent is a matter of judicial cognizance and cision.

It is indespensable that it be first determined that the spondent comes within the proviso of the Railway Labor t before the Mediation Board has any authority to enforce as to the respondent, and that depends on whether it is an terurban, and that, in turn, depends on what is the meaning that term as used in the statute. We have heretofore id that the determination as to the status of respondent as being or not being an interurban involves a mixed question law and fact, but however it may be denominated, it is bject to judicial cognizance. If it is a mixed question of w and fact the authorities are conclusive that the Courts ve a right to determine it de novo, as shown by the Pied-ont, North Shore, and Idaho cases, *supra,* but even if it not so considered, but be only a question of fact upon which e applicability of the statute depends, it still is subject ther to examination de novo, or at least to review, and a ll in equity is an appropriate remedy. *Crowell vs. Benson,* 5 U. S. 22. The difference as to whether the matter is bject to examination de novo, or only to review, involves ly the question of whether the Court may consider new idence, or whether its determination shall be upon the cord made before the Commission, which, as we have inted out, is immaterial in this case, because the evidence fore the Commission, and the evidence before the Court, to the status of respondent was substantially the same. Page 11, brief of Petitioners.)

Sixth, should it be held that although it is not shown that Congress has in any manner manifested an intention that the finding by the Interstate Commerce Commission that respondent is not an interurban electric railroad should be binding upon the courts in any case, if that finding is not arbitrary, not supported by the evidence or contrary to and against law, nevertheless that it is in the ordinary case binding within those limitations, it is our contention that it is not binding in a case in which the Act under which it is made is attacked as to its constitutionality, as in this case.

The amended bill of complaint in this case alleged, as heretofore pointed out, that respondent is an electric interurban railroad and exempt from the provisions of the Railway Labor Act, but it is also alleged that the District Attorney claimed that notwithstanding respondent is an electric interurban railroad exempted by the Act, it is not entitled to make that claim, because the Interstate Commerce Commission has determined that respondent is not an interurban electric railroad, and has threatened to prosecute respondent and its officers for failing to comply with the Act, and that if said determination is to be construed to be binding upon it, such determination deprives respondent of its constitutional rights, because the authority to make such a binding determination is an unconstitutional delegation of legislative power, in violation of the Fifth Amendment to the Constitution of the United States and deprives respondent of its constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States, and further that even if the respondent should be held not to be an interurban electric railroad and within the Act, the Act itself is unconstitutional, in the particulars set out in said complaint (R. 17, 29). In other words, this suit is grounded upon the proposition that respondent is an interurban electric railroad exempt from the provisions of the Railway Labor Act, because it claims that it is in fact such a railroad; that notwithstanding it claims that in fact it is such a railroad the District Attorney claims that Congress has vested in the Interstate Commerce Commission authority to determine respondent's status in that regard, and pursuant to that authority the Commission has determined that respondent is not an interurban railroad, and that finding is binding upon respondent; that if such finding is construed to be binding, then it violates respondent's constitutional

rights, as above stated,—this being an attack upon one particular phase of the Act applicable only to respondent and interurban railroads similarly situated, and further the Act as a whole and in certain particular sections thereof is unconstitutional, this being a general attack applicable to all railroads, whether interurban or not.

The first question that arises under such a pleading, at the trial is: "Which proposition will the court determine first, whether respondent is exempt from the provisions of the Act, or whether it is unconstitutional under the special or general attack upon the constitutionality of the Act?" The answer to this question is not difficult, either upon principle or authority. Manifestly a court should not determine the constitutionality of a legislative act, either National or State, unless it is necessary to make the determination. If exemption from its provisions is claimed by respondent, the court will determine that question first, because if respondent is exempt, there will be no necessity for the determination of the constitutionality of the Act, either those provisions especially applicable to respondent and those similarly situated, or applicable to all who are held to come within its purview, and it is only in the event that the claim of exemption is denied that it will become necessary to determine the constitutional questions. *Lee, Comptroller vs. Bichell et al*, 292 *U. S.* 415. *Blair vs. United States*, 250 *U. S.* 273, *Siler vs. Louisville & N. R. Co.*, 213 *U. S.* 175, *Modern Woodmen of the World vs. Casados*, 15 *Fed. Supp.* 483.

Now, in taking the first step, in determining the first question, in determining the question as to whether respondent comes within the purview of the Act, there will ordinarily be no more difficulty than in determining any other question of fact or law, and it may be either. But where, as in this case, the claim is asserted that the court is not free to determine whether respondent comes within the Act, because that matter has been determined by an administrative body pursuant to legislative authority, and that determination is binding upon the court, a preliminary question arises, namely: Can the finding bind the court when it is engaged in determining a preliminary question necessary to be determined in the exercise of its jurisdiction to determine whether it

will pass on constitutional questions, though it may be binding in other cases? We are not here dealing with the question which we have heretofore discussed, namely, whether a finding is binding, notwithstanding Congress has not made it binding. We are assuming that it is ordinarily binding, either because Congress has specifically or by necessary implication said it is binding, or else that it is held that such manifestation of intention is unnecessary. Nor are we dealing with the question, heretofore considered, namely, as to whether such finding is arbitrary, not supported by the evidence, or contrary to and against law. We are assuming that the finding is not subject to those objections, which apply in all cases; we are assuming that it is binding ordinarily, but is it binding in this class of case, that is, in a case involving constitutional rights of liberty or property? This is the precise question which arose in the case of *St. Joseph Stockyards Co. vs. United States, supra.* In that case, Chief Justice Hughes, speaking for the majority of the court, holds that in such a case such a finding is not binding (p. 51). Mr. Justice Brandeis, though he concurs in the result, differs with the majority on this point, although agreeing that if a constitutional question involving liberty is raised, as is the case here, the rule would govern. Justice Cardoza (with whom Justice Stone concurs) agrees with the majority, but only on the ground of stare decisis, so that the rule announced by the majority in that case is the law, and therefore in a case involving the rights of liberty or property, the finding of an administrative body of any fact necessary to be determined is not binding upon the court, and none of the cases cited on page 34 of petitioners' brief are to the contrary.

It is undoubtedly true that the rule is subject to certain limitations. One is that the constitutional questions are properly raised by the pleading, but no question is made by either petitioners that they are not so pleaded in this case. The other is that the constitutional questions are brought into the case in good faith, and no claim has ever been asserted by petitioners that they are not in this case. Indeed an examination of the record before the Interstate Commerce Commission would disclose that that question was raised at the hearing before the Examiner at the very outset. So, under this rule, the court in this case was not bound by the finding of the Interstate Commerce Commission, even if

was not, as he found it was, contrary to and against law, nd the court's finding ought not to be disturbed, even though be held that he was wrong in finding that the finding of e Commission was contrary to and against law, and can nly be disturbed if his finding is not supported by the vidence, but we think we have shown conclusively it was.

The court having found that respondent is an interurban ilroad and not within the Act, and therefore that it is unecessary to determine the constitutional questions raised ither by the special or general attack upon the Act, the ext question is: "What shall the court do?" And, of course, e answer is that having properly acquired jurisdiction of e cause, the court will proceed to its final determination, nd that is true even when because of the finding it develops at no Federal question is involved, which is not the case ere, because here a Federal statute is involved.

The cases heretofore cited under this heading sustain ll of the points herein made, but the case of *Modern Woodmen of America vs. Casados, supra,* is particularly in point. n that case, the plaintiff in its pleadings claimed that it as a fraternal insurance society and as such exempt from statute of New Mexico imposing a tax upon insurance remiums, that the state tax commissioner claimed that it as not exempt and was threatening to subject it to the heavy enalties provided in the Act, and to revoke its license for ailure to pay the tax, but that if it were not exempt then at the State Act violated certain provisions of the Federal onstitution. The only claim made by the defendant in e case as to the applicability of the statutes on a motion to ismiss the bill was that the plaintiff was in fact an ordinary nsurance company, but masquerading as a fraternal society, being admitted that fraternal societies were exempt under e statute. The court determined from an examination of e allegations of the bill that the plaintiff was a fraternal ociety, exempt under the statute. It declined to pass upon e constitutional questions involved and enjoined the colection of the tax. Except that the statute which was under ttack in that case was a State and not a Federal statute, hich of course makes no difference, and except that in that se the finding by an administrative body was not involved, hich makes no difference, because that matter is governed

by the rule announced by Chief Justice Hughes, the case is precisely like this case.

So there can be no doubt the trial court was not only justified in finding, but it was his duty to find independently upon the question whether respondent is an interurban railroad.

But it is suggested that this Court in the case of *Virginian Ry. Co. vs. System Federation No.* 40, 300 U. S. 515, since the decision in this case by the trial court, has decided that the Railway Labor Act here in question is constitutional and therefore that there is now no constitutional question involved in this case. Even were that the case to the fullest extent, it would make no difference, because in determining whether in a case there are constitutional questions involved, so as to enable the trial court independently to determine the facts necessary to decide them, does not depend upon whether they would, when reached, be determined in favor of respondent, but whether they are raised in good faith, and we have shown in this case that they were. But in the Virginian Ry. case, supra, the constitutional questions herein raised were not determined, because the Virginian Railway was not an electric line, and these questions are still in this case. We still insist, then, that there are certain constitutional questions respecting the law which were not involved in the above case, and which respondent or any electric interurban railroad may raise, and these we have raised and still do raise. (See pages 73, 74 and 98 of this brief.)

CONCLUSION

We respectfully submit that from whatever standpoint this case may be viewed, the judgment of the Circuit Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS and INTERSTATE COMMERCE COMMISSION,

Petitioners,

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION OF THE RESPONDENT, THE UTAH IDAHO CENTRAL RAILROAD COMPANY, FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, AND SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	PAGE
Motion for Leave to File a Supplemental Brief	1
Supplemental Brief	3

TABLE OF CASES CITED

	PAGE
Crowell v. *Benson*, 285 U. S. 22	14, 15
Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U. S. 299	7, 10, 14
St. Joseph Stockyards Co. v. *United States*, 298 U. S. 38	14, 16
Top Line Cases, 234 U. S. 1	14
Texas Electric Railroad, 208 I. C. C. 193, 202	8
United States v. *Idaho*, 298 U. S. 105	14
United States v. *Chicago North Shore & Milwaukee Railroad Co.*, 288 U. S. 1	4, 14

STATUTES CITED

	PAGE
Bankruptcy Act, Section 77(m)	9, 10
Interstate Commerce Act,	
Section 1, Par. 3	10
Section 1, Par. 4	10
Section 15a	9

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MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Now comes The Utah Idaho Central Railroad Company, the respondent herein, and respectfully moves that this Honorable Court accept and consider the supplemental brief in the form annexed hereto and made a part hereof. This motion is made because, upon the argument of this case, the Chief Justice of this Honorable Court expressly inquired as to a question having a vital bearing upon the problem involved, viz., as to a definition of the term "interurban railroad", as that term is used by Congress in the Railway Labor Act.

Respectfully submitted,

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Respondent.
No. 28

SUPPLEMENTAL BRIEF OF RESPONDENT

The single purpose of this supplemental brief is to answer the question put by the Chief Justice at the oral argument of the case, to wit, "What is the definition of the term 'interurban railroad' as that term is used by the Congress in exempting such railroads from the Railway Labor Act?"

The answer is: "An interurban railroad is one which, by reason of its physical characteristics, is enabled to offer to the public but one type of transportation service, namely, that which can be accomplished by short, light, rapidly moving trains, operated at frequent intervals of time and making frequent stops for the receiving and delivering of passengers and freight—a type of transportation service distinct and separate from that which other carriers in the

transportation field, as, for instance, ordinary steam railroads or motor truck lines, are capable of giving by reason of their physical characteristics."

It is conceded that in arriving at the definition of the term its derivation does not give us any aid, because practically all railroads, indeed all transportation facilities, are operated between cities. To arrive at its particular meaning as used by the public and by the Congress, therefore, the proposition must be considered in its historical aspect. Commencing at about the beginning of the century there developed, primarily by reason of the advances made in the electrical field, a new type of railroad, which was distinct and separate, in its physical characteristics, from those in existence, as well as in the character of the service it offered to the public, which for want of a better term was called interurban. True, as stated by Mr. Justice Roberts, speaking for this Court in the case of *United States* v. *Chicago, North Shore and Milwaukee Ry. Co.*, 288 U. S. 1, interurban railroads were, as a rule, at the outset primarily engaged in the transportation of passengers, but this was by no means universal, for almost from the beginning this new type of railroad was found by the public to be capable of carrying on a special kind of freight business which met a special need of the public. This may be described generally as a local service consisting in gathering or collecting the products of the territory served, for delivery either in their original state or when processed or transformed into manufactured products, to the trunk lines of railroad for transportation by them to the markets. With the ever-increasing need of rapid transportation of such products to the processing or manufacturing plants and thence to the markets, or, if they needed no processing or

manufacturing, direct to the markets, this service rendered by interurbans became increasingly important, and at the time respondent's line was constructed, the fact had become thoroughly established that such service was as much a part of the service to be rendered by interurbans as passenger service. At the present time the interurbans which do not furnish that type of service are negligible in number. Certainly those cities and towns which granted the respondent by franchises the right to operate over their streets, and in the franchises restricting the respondent in its operations to that of an "interurban railroad", had no conception that thereby they were restricting it to the carriage of passengers, else they would not have continuously ever since permitted it to carry freight along their streets.

The historical aspect of the situation is, of course, more fully set out in the Record at pages 79-82, 158-161; in respondent's original brief at pages 5-14; and in the brief of The American Transit Association, as *amicus curiae*, at pages 3-5.

There is no doubt that the public easily recognizes the two types of railroad as distinct and separate. If the average man living in the territory served by respondent's line were asked what transportation service there is between Ogden and Preston, he would unhesitatingly say "There is a steam railroad and an interurban." Indeed, he would be shocked beyond measure if his statement that respondent is an interurban was questioned, or if he was told that it is not, because its freight business is so extensive because he would know that it has always carried freight, and would also know of the industrial processing and manufacturing plants on its line to and from which such freight is carried, which plants constitute the locality's most important

industrial development. He would likewise know that such freight business is the primary freight business of the company, and while it carries some other freight, such other freight business is but incidental thereto. (See pages 29 and 30 of respondent's original brief.) True, he probably would not be able to give the reasons why respondent's operations in serving the public in the transportation field are different from those of a steam railroad, for he would not be concerned with causes, but only with results.

However, the mere fact alone that the respondent's line substantially paralleled the tracks of a steam road, except in its use of city streets, shows that it must have been conceived that it would perform a different service to the public else it would never have been built. The fact that the amount of freight it carries today or the revenue derived therefrom does not differ from what it carried when it first started operation demonstrates that the purpose to be served from the beginning was not merely the transportation of passengers, and that, if the respondent ever was an interurban, it still is, for neither its physical characteristics nor its operations have in any wise changed except that it has lost passenger business due to the increasing use of the privately-owned automobile (R. 138-139).

The purpose of the testimony introduced by respondent before the Commission and before the Court, and the thesis of our original brief, was to show that the differences which, as we have said, are well known to the public, in operation between an interurban railroad, using the respondent as an example of an interurban, and the steam railroads operating in the territory, and a steam railroad operating in part by electric power, are not merely accidental but are brought about by the differences in their

physical characteristics. In the case of the respondent they compel it to operate as it does, all of them being integrated so that all would have to be changed in order for it to operate the long heavy trains, either passenger or freight, operated upon steam railroads, because the change of any one characteristic would not suffice. Moreover, its line would have to be relocated so as to remove it from the city and town streets, which, within their corporate limits, it occupies to the extent of almost 100% of its line. (Respondent's original brief, pp. 15-34.)

It was suggested by the Chief Justice that a comprehensive definition of an interurban railroad was given by this Court in *Piedmont & Northern Railway Company* v. *I. C. C.*, 286 U. S. 299. It can not be denied that in that case the Court, speaking through Mr. Justice Roberts, referred to the fact that the railroad in question in that case was predominantly a freight-carrying road, but when the *North Shore* case, *supra*, came before this Court, it became necessary to limit the effect of the *Piedmont* case to the precise question which was before this Court in that case, namely, whether the Piedmont had to have from the Commission a certificate of convenience and necessity to construct what would have been a link in a trunk line railroad, and this Court held that it did, because the Congress had declared in the Transportation Act its policy to be that such competing roads with already existing roads should not be constructed with the result that what would otherwise be an interurban would be transformed into trunk lines, except where there was necessity therefor. In the *North Shore* case this Court held the railroad therein was an interurban, notwithstanding it was extensively engaged in freight business. (See respondent's original brief, pp.

39 and 63.) It is significant that the Interstate Commerce Commission in the later cases coming before it, and in which it attempted to say, in contravention of its previous holdings which recognized that a railroad did not cease to be an interurban because extensively engaged in the freight business, that what would otherwise be an interurban railroad may cease to be such because of the character of its freight business, has expressly repudiated the proposition that the predominance of freight revenue is in any sense a determining factor. *Texas Electric Railroad*, 208 I. C. C. 193, 202, the Commission said that an electric railway which is engaged in the general transportation of freight *"whether the revenue therefrom is greater or less than its passenger revenue*, which handles its freight in standard equipment similar to that used by the steam lines, a considerable portion of which is handled in interstate or foreign commerce, and which participates in joint rates with steam railroads for interstate shipments, has more of the characteristics of a commercial railroad operated by electric power than an interurban as that term is used in the exemption provision under consideration". (Italics ours.) The evidence in this case clearly shows that a part of a steam railroad operated by electric power has, except as to that, precisely the same characteristics as the steam portion and its operations are precisely the same. It can haul as long, heavy trains, both passenger and freight, as the steam portions (R. 103-105), which is not true of the respondent's line, which by reason of its physical characteristics, other than the mere character of power used, cannot, although its manner of using that power does so limit it. That part of a steam railroad which is electrified performs for that part of the territory served precisely the

same function as is performed by the steam portion for the territory served by it. Not so with a line like respondent, which performs an entirely separate and distinct function as to the carriage of both passengers and freight to that of the steam railroad operating in the same territory (Exhibit 4, R. 161 *et seq.*).

Now, our complaint is that the Congress, having used the term "interurban" without defining it, must be held to have used it in the popular sense which did not contemplate that either the extent of or the manner of handling the character of freight business is the factor which determines whether a railroad is or is not an interurban railroad, and that the Commission in deciding otherwise did so contrary to law.

Moreover, as we have shown in our original brief—if there were any doubt as to the popular meaning of the term—the Congress has clearly indicated its intention that the fact that a railroad was engaged "in the general transportation of freight" should not be the determining factor, for it has expressly stated that a railroad might be engaged in the general transportation of freight, and still be an interurban (Section 15a of Interstate Commerce Act, Section 77(m) of Bankruptcy Act). The Commission indeed so admits in the above-quoted language, but says the determining factor is rather how the freight is handled, that it is transported in standard equipment, interchanged with other roads, and that at least some of it moves in interstate or foreign commerce over joint routes and upon joint rates with which they have been established. Yet with as much emphasis as it has said that the fact that a railroad is engaged in the general transportation of freight is not controlling, the Congress has said that none of these facts is

controlling. It has required all carriers engaged in interstate commerce, including respondent, to establish joint routes and through rates with other carriers and to furnish the necessary hauling facilities for interchanged business (Paragraphs 3 and 4, Section 1 of the Interstate Commerce Act). It would not only be uneconomical, but absurd that the freight which is thus required to be interchanged should have to be carried in a different type of car and then changed into a standard car. Indeed the Congress in its latest use of the term "interurban", since the statute here in question was enacted, and since the decision in the *Piedmont* case, has not only said that a railroad may transport freight in standard equipment but may derive more than 50% of its revenue from that source and still be an interurban (Section 77(m) of the Bankruptcy Act).

It is, we submit, illogical to say that the character of a railroad is determined by the manner in which its freight is handled, because that depends, not upon the character of the railroad, but upon the character of the business of the shipper, for it is the shipper, not the railroad, that determines how and to whom his freight shall be shipped.

The Commission assumed, in determining respondent is not an interurban, that the Congress had left to its judgment whether a particular railroad is an interurban as it had repeatedly requested be done, and gave it authority to exempt only such as were in its judgment exempt, but the Congress did not do that. It specifically exempted all electric interurban railroads, leaving only to the Commission, in the first instance, to determine whether a particular railroad came within the meaning of that term as popularly understood and as it itself had defined it. The action taken by the Commission clearly shows it is its intention under

he Act to substitute its own judgment for that of the Congress, for in its determinations so far made under the Act, it has in every instance except one held that the electric railroad under consideration was not an interurban—that exception being the North Shore, which it reluctantly and only out of deference to this Court's decision as to it, held was an interurban. But now that the Railroad Retirement Board has requested the determination of the status of that railroad under the Railroad Retirement Act, the Commission has reopened the case under the Railway Labor Act. The result, then, will finally be, if the Commission has its way, that there will be no interurbans in the country, except possibly those few which are exclusively passenger-carrying roads. This is obviously not what the Congress intended, else it could easily have said so.

The fundamental purpose of the Congress to exempt, so far as practicable, the short line interurban railways from the scope of the centralized administration by the Interstate Commerce Commission at Washington, has been evidenced by the repeated insertion by the Congress in Federal statutes of the same exemption under consideration in this case. Broadly speaking, the whole congressional history is eloquent of the intention to protect just such carriers as this respondent from the necessity of coping with that type of centralized administration which was considered necessary for the great trunk line steam railroads. Reversal of the decisions below in the present case would be (we submit) to defeat the intent of the Congress in favor of an engrossing attitude on the part of a centralized administration. We do not say that the Congress lacks the power to take this step; nor do we say that the Congress is not the judge of whether the desir-

ability of central administration surmounts the obvious injustices flowing from the application of centralized bureaucratic power to small and remote localized industries such as this. What we do say, is that the history of the congressional statutes on the subject, when objectively and dispassionately weighed, shows that the opposite was the intent of the Congress in this case.

Congress has repeatedly, both before and after the enactment of the Railway Labor Act, reserved to itself the authority—in spite of the requests of the Commission that it do otherwise—to exempt all electric interurban railroads, or certain classes thereof, from laws relating to steam railroads which make up the national railroad system of the United States. In the Railway Labor Act it exempted them all, unless they were a part of one of the steam railroads which constituted a part of that national system. Obviously, when it sought on a national scale to regulate labor relations and conditions on the steam railroads which constituted the national system, it recognized that the same conditions of employment did not prevail on electric interurbans as on steam railroads, nor were the relations of the employers to their employees the same.

This is clearly shown by the record. On respondent's line the employees are home every night, instead of being absent therefrom several days at a time as on the steam lines, and this condition is typical of interurbans. The dangers encountered in their employment are not comparable. The employees of respondent are and have been for many years organized in a separate union, as is the case with interurbans throughout the country, so that there could be no collective bargaining by its employees through an agency national in scope on railroads as contemplated

the Act, nor could any labor disputes arising on respondent's line be settled by a body (The National Adjustment Board) composed equally of employers and employees representative of organizations "national in scope" as contemplated by the Act (§ 3, First, (a)).

Now, if the Commission is to be permitted to substitute its judgment as to what the law should be as to what is or is not an interurban for what it is popularly understood to be and fixed by the clear intendment of the Congress, and thus exercise its independent judgment as to what electric railways should be exempted from the Railway Labor Act, then different legislation from that which has been actually enacted would have to be enacted. That is why we say, as did the lower courts, that the Commission's determination is against law.

It is not disputed that the purpose of the Congress was, in permitting the reference to the Interstate Commerce Commission, to have the facts as to whether respondent comes within the Act determined by that body, because of its experience in such matters, but we do dispute that the Congress thereby evidenced any intention that it thereby delegated to the Commission authority for legislative determination of what railroads should, as a matter of law, be exempted from the Act, because what railroads should be exempted is fixed by the language it used.

Now, the problem which confronted the respondent, after the determination by the Commission and its adoption by the National Mediation Board and the issuance of the latter's order thereon, was how, if at all, that determination could be reviewed. It was necessary for respondent to review it if possible, because immediately thereafter there appeared upon the scene a representative of the

Brotherhood of Railroad Trainmen who persuaded the company's employees to quit the union to which they had theretofore belonged and with which the company had a contract, as it had had since 1917, and join his union. Then, as their representative, he presented to the company a contract and demanded the acceptance of a contract which is the standard contract governing employees on the steam trunk roads. Its acceptance would have been an additional expenditure of $35,000.00 per year (R. 119-138). The railroad was already being operated at a loss (R. 138). It could not stand such an increase in operating costs. Its life was at stake. So it determined to refuse to comply with the order of the Mediation Board. But it and its officers were subject to the cumulative penalties provided by the Act as a result of criminal prosecutions. The only review for the company possible was to ask the Court to restrain the bringing of such prosecutions, claiming that it was not subject to the Act, and if it were, the Act would be unconstitutional as to it. Then arose the question of what evidence should be introduced.

This Court had decided in the following cases:

Tap Line Cases, 234 U. S. 1;
United States v. *Idaho*, 298 U. S. 105;
North Shore Case, supra;
Piedmont Case, supra;
Crowell v. *Benson*, 285 U. S. 22;
St. Joseph Stockyards Co. v. *United States*, 298 U. S. 38;

that the Court in such a case would review the determination by the Commission, or other administrative officer or body, and the only difference of opinion among the mem-

bers of this Court was the extent thereof; whether the Court in determining the question would confine itself to an examination of the record before the Commission or whether new evidence could be introduced. The majority of this Court had taken the latter view, namely, that where, as here, there is involved a question of law, namely, what is the meaning of the term interurban as used in the Act, and a question of fact, namely, whether respondent is an interurban within the meaning of that term, the trial court and this court will determine both questions upon the evidence introduced before it. The majority of the Court, speaking through the Chief Justice, in *Crowell* v. *Benson*, *supra*, held that where the question arises as it did in that case whether the relationship of employer and employee existed and whether the injuries to the employee relied upon were upon the navigable waters of the United States, in other words, whether the claim came within the Act, were matters which the Court would determine *de novo*. So here, whether respondent is exempted from the Act, what Congress meant by the term "interurban" and whether respondent is such an interurban, must under that decision be determined *de novo*. So the respondent brought the exhibits which had been introduced before the Commission up to date and introduced them in the trial before the court. It introduced only one new exhibit, namely, one showing an additional limiting factor upon its operations which had theretofore been overlooked and which evidence was purely cumulative. (Exhibit 8, R. 86-88.) Then, in response to the claim of petitioners that the report of the Commission, which petitioners introduced in evidence, was binding upon the Court, respondent introduced in rebuttal all the evidence before the Commission to show that it was against law. It being admitted that the evidence before the Court and

the Commission was substantially the same, the ques[tion] as to the extent of the review, which has heretofore [been] the Court, need not be determined in this case. As [said] by Mr. Justice Brandeis in the case of *St. Joseph Stockyards Co. v. United States, supra*:

> "* * * where what purports to be a finding upon a fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State."

So examined, we submit the record shows that the Commission determined respondent's line of railroad, admittedly electric, not to be an interurban solely because it misconceived the meaning of that term as used in the Act exempting such railroads from it, and that upon the record both before the Commission and the Court, under the law and the facts respondent does not come within the Act.

Respectfully submitted,

J. H. DeVine,
J. A. Howell,
Neil R. Olmstead,
Counsel for Respondent.

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No. 28

IN THE

Supreme Court of the United States

October Term, 1938

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION,
Petitioners,

vs.

THE UTAH-IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit.

Brief of American Transit Association as Amicus Curiae

ROBERT E. QUIRK,
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Index

	Page
INTEREST OF AMERICAN TRANSIT ASSOCIATION	1
STATEMENT OF THE CASE	3
UNLAWFUL STANDARDS WERE USED BY THE INTERSTATE COMMERCE COMMISSION IN DETERMINING THAT RESPONDENT IS NOT AN INTERURBAN ELECTRIC RAILWAY	8
CHARACTERISTICS OF AN INTERURBAN ELECTRIC RAILWAY	18
THE COMMISSION IS ATTEMPTING TO ESTABLISH BY ADMINISTRATIVE CONSTRUCTION ITS LEGISLATIVE RECOMMENDATIONS WITH REGARD TO INTERURBAN ELECTRIC RAILWAYS WHICH CONGRESS HAS FAILED TO ADOPT	24
DECISION OF THE UNITED STATES RAILROAD LABOR BOARD, DECEMBER, 1920	34
THE COURTS HAVE JURISDICTION TO MAKE A *DE NOVO* DETERMINATION OF THE STATUS OF RESPONDENT UNDER THE RAILWAY LABOR ACT	38
CONCLUSION	50
APPENDICES:	
"A" ELECTRIC RAILWAY COMPANIES, ENGAGED IN INTERSTATE COMMERCE TO SOME EXTENT, WHICH ARE MEMBERS OF THE AMERICAN TRANSIT ASSOCIATION	53
"B" SECTIONS OF FEDERAL STATUTES SPECIFICALLY MENTIONING OR EXEMPTING INTERURBAN ELECTRIC RAILWAYS	55
"C" SOME STATE STATUTES RELATING TO INTERURBAN ELECTRIC RAILWAYS (NOT INTENDED TO BE EXHAUSTIVE)	63

Cases Cited

Crowell v. Benson, 52 S. Ct. 285, 297	46
Duplex Printing Press v. Deering, 254 U. S. 443	44
Florida v. U. S., 292 U. S. 1	44

Page

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285 42
Great Northern v. U. S., 277 U. S. 172 42
Hudson & Manhattan Ry. Co. v. Lamar Hardy, U. S. Dist. Atty., 22 F. Supp. 105 31
I. C. C. v. Union Pacific R. Co., 222 U. S. 541 44
Johnson v. Manhattan Ry. Co., 53 S. Ct. 721 36
Lehigh Valley R. R. v. U. S., 243 U. S. 412, 414 42
Manufacturers Ry. Co. v. U. S., 246 U. S. 457 44
McCaughn v. Hershey Chocolate Co., 51 S. Ct. 510 36
Mississippi Valley Barge Co. v. U. S., 292 U. S. 282 44
National Lead Co. v. U. S., 40 S. Ct. 237 36
Ohio Valley Co. v. Ben Avon, 253 U. S. 287 41
Omaha & Council Bluffs Street Ry. Co. v. I. C. C., 230 U. S. 324 21
Piedmont & Northern Ry. v. I. C. C., 286 U. S. 299 ..... 21, 22, 23, 42
Piedmont & Northern Rwy. Co. v. U. S., 280 U. S. 469 ..... 42, 45
Powell, et al. v. U. S., 300 U. S. 276 46
San Francisco Electric Ry. Co. v. Scott, 142 Cal. 222 20
Shannahan, Trustee, v. U. S., 303 U. S. 596 ..... 41, 42, 48
Shields v. Utah-Idaho Central, 95 F (2) 91 31
Spokane & Inland Emplre v. U. S., 214 U. S. 344 21
Staten Island Rapid Transit Co. v. Pub. Serv. Comm., 16 F.(2d) 313 32
St. Joseph Stock Yards v. U. S., 298 U. S. 38, 74-75 46
Tap Line Cases, 234 U. S. 1 ..... 42, 45
Texas Electric Railway Co. v. Clyde O. Eastus, individually and as U. S. Atty. for Northern Dis. of Texas, No. 3662, unreported 30, 31
Texas & Pac. R. Co. v. G. C. & S. F. Ry. Co., 270 U. S. 266 ..... 42, 45
U. S. v. Atlanta, B. & C. Ry., 282 U. S. 522, 527-528 ..... 42, 48
U. S. v. Chicago, North Shore & Milwaukee R. R. Co., 288 U. S. 1 ..... 16, 22, 33, 42, 44, 45
U. S. v. Illinois Central Ry., 244 U. S. 82, 89 48
U. S. v. Los Angeles & S. L. R. R., 273 U. S. 299, 310 ..... 42, 48
U. S. v. Louisville & Nashville R. Co., 235 U. S. 314 44

Page

U. S., et al. v. State of Idaho, et al., 298 U. S. 105 ..... 42, 45
U. S., et al. v. Village of Hubbard, Ohio, 266 U. S. 474 15
United States Labor Board Decision 33 34

Decisions of Interstate Commerce Commission

Application of Section 15a of the Interstate Commerce Act to Electric Railways, 86 I. C. C. 751 ..... 13, 25
Application of Section 15a to Interstate Public Service Co., 117 I. C. C. 228 ..... 25, 33
Bamberger Electric R. R., 228 I. C. C. 267 ..... 14, 15
Cedar Rapids & Iowa City Ry. & Light Co. v. Chicago & Northwestern Ry. Co., 13 I. C. C. 250 11
Chicago & Milwaukee Electric R. R. Co. v. I. C. Railroad, 13 I. C. C. 20 11
Chicago, North Shore & Milwaukee R. R., 219 I. C. C. 135 43
Chicago, Ottawa & Peoria Ry. Co. v. Chicago & Northwestern Ry. Co., et al., 33 I. C. C. 573-575 ..... 11, 17
Cincinnati & Columbus Traction Co. v. B. & O. Southwestern R. R., et al., 20 I. C. C. 486 11
Cincinnati & Lake Erie R. R., 154 I. C. C. 603 33
Electric Railway Mail Pay Case, 58 I. C. C. 455 17
Electric Railway Mail Pay Case, 98 I. C. C. 737 ..... 17, 25
Ex Parte No. 38, Locomotive Inspection Case, 122 I. C. C. 414 ..... 31, 32, 43
Louisville Board of Trade, et al. v. Indianapolis, Columbus & Southern Traction Co., et al., 27 I. C. C. 499 11
Michigan R. R. Co. v. Pere Marquette R. R. Co., et al., 74 I. C. C. 496 ..... 12, 25
St. Louis, Springfield & Peoria R. R., et al. v. P. & P. U. Ry. Co., 26 I. C. C. 226 ..... 11, 12
Texas Electric Railway, 208 I. C. C. 193 30
Utah-Idaho Central Railroad Co., 214 I. C. C. 707 6
West End Improvement Club v. Omaha & Council Bluffs Ry. & Bridge Co., et al., 17 I. C. C. 239 11
Youngstown & Suburban Ry. Co., 175 I. C. C. 699; 227 I. C. C. 73 33

Statutes Cited

Page

Bankruptcy Act,
Section 77 ..... 10, 14, 15

Federal Control Act,
Section 1 9

Interstate Commerce Act,
Section 1, par. 4 15
Section 1, (22) 33, 40
Section 3, par. 3 15
Section 15 a 10, 13, 33
Section 15(3) 9
Section 19(a) 28, 29
Section 20(a) 4, 22, 25, 26, 27, 33, 40

Locomotive Inspection Act 32, 33, 40

National Labor Relations Act,
Sec. 10(a) 47

Railway Labor Act, 1920 36

Railway Labor Act, 1926 35

Railway Labor Act, 1934 36
Sec. 1, First 5
Sec. 2, Tenth 6, 38

Transportation Act, 1920,
Title III—Railroad Labor Board Act 34

Miscellaneous

Bureau of Census Reports for the years 1902, 1907 and 1912 ..... 11, 18, 19, 20

Annual Reports of Interstate Commerce Commission to Congress for the years 1921 to 1935, inclusive 25, 26, 27, 28, 29, 30

Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, 69 Congress 36

IN THE

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DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, *Petitioners,*

vs.

THE UTAH-IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit.

Brief of American Transit Association as Amicus Curiae

I

INTEREST OF AMERICAN TRANSIT ASSOCIATION

The American Transit Association is a voluntary, nation-wide organization comprising in its membership the

major portion of all independently operated electric railway mileage in the United States, motor carriers, manufacturers of apparatus used by such transportation agencies, and other classes of members, such as associate, individual, etc.

Among its member companies there are thirty-six independently operated electric railways, located throughout the United States, engaged in interstate commerce and commonly known as interurban electric railways. Appendix "A" hereof contains a list of the aforesaid thirty-six electric railways, showing their respective locations.

Since their inception these electric railways have been generally known and have considered themselves interurban electric railways under both Federal and State laws and many of them have been heretofore judicially and administratively determined to be interurban electric railways.

In addition to the multiplicity of State statutes and State administrative board rulings with regard to interurban electric railways there are 18 sections of different Federal statutes in which interurban electric railways are specifically mentioned or are exempted. The pertinent parts of these statutes are shown as Appendix "B" hereof.

For the convenience and information of the Court there is also set out as Appendix "C" hereof a number of State statutes which are cited to illustrate State laws in which interurban electric railways are specifically mentioned.

Until recent years there has been practically no controversy over the meaning of the term "interurban electric railway" as used in Federal and State statutes. The status of these independently operated electric railways as interurban electric railways, prior to the recent findings of the Interstate Commerce Commission in this and other cases under the Railway Labor Act, was generally recognized and well-settled. The findings of the Commission, however,

in this and other cases under the Railway Labor Act, have caused great confusion and uncertainty as to the status of these carriers under the multiplicity of statutes affecting them, and the decision of this Court in this case, therefore, is of great importance to these carriers.

II

STATEMENT OF THE CASE

The brief of the respondent will contain a comprehensive statement of the case. The undisputed facts briefly summarized are as follows:

Respondent's railway operates between Ogden, Utah, and Preston, Idaho, a distance of approximately ninety-five miles. Between its termini it runs through a number of cities and towns, on public streets and highways under municipal franchises which contain many restrictions, such as the prohibition of the use of steam locomotives as motive power and the specification of the sizes of trains, street stops, speed regulations, observance of "stop" and "go" traffic signals, and the occupancy of the streets in common with vehicular traffic. Eighteen per cent of respondent's line is on public highways or city streets. It operates over heavy grades and around many short curves and its passenger trains are usually one-car trains. Its freight trains are limited to a maximum of twelve cars and that length train may only be pulled on a short section of respondent's line. On other sections of its line but five cars may be moved in one train. Its electric power supply is integrated with its train operation and provides power sufficient only for short and frequent train movements. Its locomotives are light in weight and its track construction is usually of 70 pound or lighter steel on ties smaller than steam railroad standard. Its spur and passing tracks are

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short, commensurate with the size of its trains. Its passenger cars stop in the country at highway grade crossings and at street corners on the city streets, its stops averaging one for every mile and a half of line. In cities and towns its trains stop in the middle of the street and its stations are located on the side of the street, so that passengers must cross through vehicular traffic to reach its cars.

The respondent's predecessor, Ogden Rapid Transit Company, started as a street-car system in Ogden, Utah, in 1890. This predecessor company was extended from time to time along the country roads to other cities and towns north of Ogden. Later additional line was built connecting with the Ogden Rapid Transit Company until the respondent's present physical property was completed in or about the year 1915.

In the year 1926 respondent's property was reorganized out of receivership and 20,000 shares of common stock and two million dollars of first mortgage bonds were issued by respondent without approval of the Interstate Commerce Commission as required by Section 20a of the Interstate Commerce Act if respondent is not an interurban electric railway. These securities were issued by respondent without the approval of that Commission because respondent believed and considered itself exempted as an interurban electric railway from Section 20a. The Interstate Commerce Commission not only had knowledge of this transaction, but, in a series of letters addressed to respondent, directed the accounting procedure that should be followed in setting up the transaction on respondent's books. No objection to the issuance of the securities without Commission approval was ever made by the Commission, although Section 20a makes securities issued by railroads subject to its provisions void unless prior approval has first

been obtained from the Commission, and provides drastic penalties for its violation.

In 1935 the gross revenue of the respondent was $514,000; the average annual gross revenue over a period of 20 years was $697,000 per year; the average annual operating revenue during that period from passenger traffic was $217,000. The passenger revenue in 1935 was $64,000; the average annual freight revenue during the 20 year period was $404,000. In 1935 the freight revenue was $403,000. During the entire period of twenty years there has been no substantial change in the type of freight operation or the revenue produced by it, whereas the passenger revenue in 1935 was $153,000 less than the annual average for the 20 year period. The reduction in passenger revenue has been due to the increased use of automobiles and buses.

The respondent interchanges car-load freight with electric and steam railroads and maintains joint rates with such railroads.

This case arose on a suit instituted by the respondent in the United States District Court for the District of Utah, to enjoin the petitioner, Shields, individually and as United States Attorney for the District of Utah, from enforcing the provisions of the Railway Labor Act against respondent.

Section 1, First of the Railway Labor Act, reads as follows:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in

connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

Under the provisions of Section First of the Railway Labor Act, the Mediation Board requested the Interstate Commerce Commission to determine the status of respondent. A hearing was held and on March 18, 1936, the Commission found that respondent is not an interurban electric railway. Railway Labor Act Docket No. 12—*Utah Idaho Central Railroad Company,* 214 I. C. C. 707. Thereupon, a demand was made upon respondent for compliance with the Railway Labor Act and prosecution was threatened under Section 2, Tenth, which reads as follows:

"The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six

months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

The Federal District Court granted the injunction sought by respondent and found the respondent to be an interurban electric railway which is not operating as a part of a general steam railroad system of transportation. Petitioner appealed from that decree to the United States Circuit Court of Appeals, Tenth Circuit. That court sustained the decree of the lower court (95 Fed. (2d) 911). The case is here on certiorari.

III

UNLAWFUL STANDARDS WERE USED BY THE INTERSTATE COMMERCE COMMISSION IN DETERMINING THAT RESPONDENT IS NOT AN INTERURBAN ELECTRIC RAILWAY.

Although, as shown by the pleadings, it is the position of the respondent that the courts below had the authority to decide the question involved *de novo* and without regard to the decision of the Interstate Commerce Commission, it is felt that a brief discussion of the fallacious grounds on which the Commission has based its findings under the Railway Labor Act in this and other proceedings is appropriate, because it will demonstrate beyond doubt that the Commission has misconstrued the statute and that the courts below have correctly construed it.

In concluding that the respondent is not on interurban electric railway under the Railway Labor Act, the Commission made the following findings:

> "* * * We are of the opinion that an electric railway which is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue, which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam railroads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric power than of an interurban as that term is used in the exemption provision under consideration."

An analysis of these factors laid down by the Commission as characteristics which remove an electric railway from the interurban class shows indisputably that the Commission has disregarded specific provisions of the Acts of Congress descriptive of interurban railways, the common understanding of the characteristics of interurban railways, as evidenced by State and Federal statutes, State administrative board decisions and State and Federal Court decisions as well as a long line of the Commission's own decisions, and has arbitrarily and capriciously adopted its own legislative recommendations to Congress which it repeatedly and continuously urged but which Congress has failed to accept.

(a) The first standard used by the Commission in its findings in this case is that "an electric railway which is engaged in the general transportation of freight" is not an interurban electric railway. This standard is unlawful, arbitrary and capricious because Congress has repeatedly enacted laws which recognize that an interurban electric railway may be "engaged in the general transportation of freight." Section 15(3) of the Interstate Commerce Act, enacted in 1910, provides:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character;"

Section 1 of the Federal Control Act, approved in March, 1918, provides:

> "*Provided, however,* that nothing in this paragraph shall be construed as including any street or interur-

> ban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both."

Sections 204 and 209 of the Transportation Act, 1920, contain almost identically the same language as Section 1 of the Federal Control Act.

Section 15a of the Interstate Commerce Act, before it was repealed in June, 1933, provided:

> "* * *; the term 'carrier' means a carrier by railroad * * *, excluding * * *, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight* * * *." (Italics ours.)

Section 77(r) of the Bankruptcy Act, approved in March, 1933, and paragraph (m) which superseded paragraph (r) in August, 1935, reads as follows:

> "The term 'railroad corporation' * * * means any common carrier by railroad * * *, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."

That the Commission well understood that Federal law recognized the fact that an interurban electric railway might be "engaged in the general transportation of freight" is best evidenced by reference to many of its own decisions handed down prior to 1927. In the following cases, decided by the Commission from the year 1907 to 1915 in-

clusive, the Commission specifically recognized that interurban electric railways were transporting freight extensively, and, furthermore, that the Commission had jurisdiction to require the steam railroads to participate in the establishment of through routes and joint rates with such electric lines. *Chicago and Milwaukee Electric Railroad Company* v. *I. C. R. Co.*, 13 I. C. C. 20; *Cedar Rapias & Iowa City Railway and Light Company* v. *Chicago & Northwestern Railway Co.*, 13 I. C. C. 250; *West End Improvement Club* v. *Omaha & Council Bluffs Railway and Bridge Co., et al.*, 17 I. C. C. 239; *Cincinnati & Columbus Traction Co.* v. *B. & O. Southwestern R. R., et al.*, 20 I. C. C. 486; *St. Louis, Springfield & Peoria R. R., et al.*, v. *P. & P. U. Railway Co.*, 26 I. C. C. 226; *Louisville Board of Trade, et al.*, v. *Indianapolis, Columbus & Southern Traction Co., et al.*, 27 I. C. C. 499; *Chicago, Ottawa & Peoria Ry.* v. *C. & N. W. Ry. Co., et al.*, 33 I. C. C. 573.

In these decisions the transportation of freight by interurban electric railways was specifically recognized. This was in accordance with the common understanding of the functions of an interurban electric railway and was in harmony with the recognition of freight transportation on interurban electric railways which was given to that fact by the Bureau of Census of the United States Government as far back as 1902. In the Bureau of Census Report entitled "Street and Electric Railways, 1902", interurban electric railways were described as frequently being heavy freight carrying railroads, and, again, in the Bureau of Census Report in 1907 it was remarked that the increase in income from freight business transported over interurban lines between 1902 and 1907 was over 400 per cent. The Bureau of Census Report in the year 1912 set out that interurban electric railways owned and used nearly 8,000 freight, express and baggage cars, operated 277 elec-

tric locomotives, and derived more than ten millions of dollars in revenue from the transportation of freight.

A few illustrations of the extent of the Commission's decisions recognizing the transportation of freight by interurban electric railways serve to emphasize the fact that the Commission well understood the freight carrying characteristics of interurban lines. In February, 1913, the Commission designated a group of electric lines as "interurban electric railways working under a common management with other electric lines, all known as the Illinois Traction system." The decision in that case contained the following description of the lines which the Commission designated "interurban electric railways":

> "The complainants conduct a general passenger and freight business, and their lines are standard gauge with rails and ballast of regular steam-road standard. Their traffic manager testified that they own 900 cars, of which approximately 125 are passenger and motor cars and 775 are freight cars. The freight cars are of 80,000 pounds capacity each, were constructed in accordance with master car builders' rules, and are equipped with safety appliances required by law and rules of the Commission." (*St. Louis, Springfield & Peoria Railroad, et al.* v. *P. & P. U. Railway Co.*, 26 I. C. C. 226.)

Another Commission decision emphasizing the fact that interurban electric railways were engaged in the "general transportation of freight" was made in November, 1922, in *Michigan R. R. Co.* v. *Pere Marquette R. R. Co., et al.*, 74 I. C. C. 496. The following language is found in that decision:

> "Complainant, a railroad corporation, operates electric interurban lines wholly within the State of Michi-

gan * * *. (The lines) are of standard railroad construction, laid with 80 pound rails, and ballasted throughout, and traverse private rights of way except through the municipalities of Grandeville, Holland, and Kalamazoo. Complainant is a member of the American Railway Association, The Master Car Builders' Association, the Bureau for the Safe Transportation of Explosives, the Per Diem Association, the Freight Claim Association and the American Short Line Railroad Association. It makes monthly and annual reports to this Commission and complies with our accounting requirements. Its freight motive power consists of 11 electric locomotives of an average horsepower of 540 each. It owns and operates 19 box cars of 60,000 pounds capacity, interchangeable with steam lines * * *. Its lines have physical track connection for interchange of freight with the lines of steam railroads * * *. Its freight revenue for the first eleven months of 1920 was $448,511, about 24 per cent of its total revenue. * * *"

In the year 1924, in *"Application of Section 15a of the Interstate Commerce Act to Electric Railways,"* 86 I. C. C. 751, an illuminating discussion by the Commission of the subject of interurban electric railways and the business that they transact will be found. Without laboring the matter, the following language is quoted from the decision:

> "Considering the responsibilities as well as the benefits of carriers under Section 15a, it seems clear that Congress intended to exclude interurban electric railways generally from its operation, and to include them only when engaged in such general transportation of freight as would cause them to resemble steam roads in the performance of that function."

The excluding language in section 15a, unlike the excluding language in other sections of the Interstate Commerce

Act and other Federal statutes, includes an interurban electric railway if it is engaged in the general transportation of freight. That section demonstrates beyond doubt that, as no similar language is used in the Railway Labor Act or in other Federal acts, it is erroneous for the Commission to hold, in construing the Railway Labor Act, that it also includes an interurban electric railroad if engaged in the general transportation of freight. The well known doctrine of exclusion repels any such construction. It will thus be seen that the first standard used by the Commission in its findings in the instant case to the effect that an interurban electric railway ceases to be such, if it engages in the general transportation of freight, is arbitrary, capricious and unlawful.

(b) The second standard used by the Commission in its findings in this case is " * * * which handles the bulk of such freight in standard equipment similar to that used by the steam railroads." Such standard used by the Commission as one of the functions which removes an electric railway from the interurban class is unlawful. Section 77 (r) and (m) of the Bankruptcy Act as amended, specifically states that an interurban electric railway may derive more than fifty percentum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Moreover, as recent as June, 1938, the Commission itself, in 228 I. C. C. 267 described the Bamberger Electric Railroad as follows:

> "The debtor's 36 miles of line is an interurban electric railroad between Ogden and Salt Lake City, Utah, and is located wholly within the State of Utah. It derives more than 50 per cent of its operating revenues from the transportation of freight in standard freight equipment."

(c) The third standard used by the Commission in its findings in this case is "* * * which freely interchanges the same (standard equipment) with the steam railroads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce." All interurban electric railways engaged in interstate commerce are subject to the Interstate Commerce Act and the jurisdiction of the Commission, except where exempted. *U. S.* v. *Village of Hubbard, Ohio,* 266 U. S. 474.

Paragraph 4 of Section 1 of the Interstate Commerce Act, (Part I) provides:

> "It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable requests therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes * * *".

Paragraph (3) of Section 3 of the Interstate Commerce Act, (Part I) provides:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines * * *."

The law, therefore, requires free interchange of business between interurban electric railways and steam railroads, and, moreover, Section 77 of the Bankruptcy Act, and the Commission's decision in the *Bamberger Electric Railroad*

Company Case, show that this part of the standard adopted by the Commission in determining the status of the respondent in this case is unwarranted and unlawful. Furthermore, in *U. S.* v. *Chicago, North Shore & Milwaukee Railroad Co.,* 288 U. S. 1, this Court stated that the North Shore handled 87 per cent of its car-load freight traffic in interchange with other railroads and that 78 per cent of all its freight traffic was inter-line, and this Court held the North Shore to be an interurban electric railway. It surely cannot be said that an interurban electric railway forfeits its character as such, because it complies with the duties imposed by law on that class of carriers, to establish through routes, joint rates and interchange facilities for the handling of freight and passenger traffic.

(d) The fourth standard used by the Commission in its findings in this case is "* * * and participates in joint rates with the steam railroads for interstate transportation." In the *Chicago, North Shore & Milwaukee Railroad Case,* this Court found that the North Shore had in effect 206 tariffs in which it participated in joint rates as an initial carrier and more than 800 in which it participated as delivering or intermediate carrier in conjunction with steam railroads, and the Court found the North Shore to be an interurban electric railway.

Sections 1 and 3 of the Interstate Commerce Act set out the law with regard to the interchange of business between interurban electric railways and steam railroads. Such interchange of business cannot be conducted without through routes and rates. This part of the Commission's standard is also unlawful, and is expressly contrary to many Commission decisions, wherein joint rates on freight traffic were prescribed by the Commission for use between interurban electric railways and steam railroads.

For example, in March, 1915, the Commission, in its ecision in *Chicago, Ottawa & Peoria Ry. Co.* v. *Chicago & Northwestern Railway Co., et al.*, 33 I. C. C. 573, at page 75, uses the following language:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with interurban electric railroads engaged in the interstate transportation of freight has long been settled." (citing cases.)

In July, 1918, Congress enacted the Electric Railway Iail Pay Act which authorized the Commission to fix rates f mail pay for service on "urban and interurban electric ailways." In the *Electric Railway Mail Pay Case*, 58 C. C. 455, the Commission said, among other things:

> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads so far as mail transportation is concerned. Many of them do considerable freight and express business, in addition to their passenger business. * * * A few lines receive greater revenue from freight and express than from passenger business."

Later, in the second *Electric Railway Mail Pay Case*, 98 C. C. 737, the Commission said:

> "Mail service is now authorized on the lines of 311 urban and interurban electric railway companies."

Although, in the second *Electric Railway Mail Pay Case* ne Commission prescribed rates of mail pay as to urban nd interurban electric railroads, many of which then parcipated in joint freight rates with steam railroads and

interchanged carload freight in standard steam railroad equipment, the Commission has since found some of these very carriers not to be interurban electric railroads under the Railway Labor Act, because they do participate in joint freight rates and interchange freight with steam railroads in standard steam railroad equipment.

The foregoing analysis and discussion of the standards used by the Commission in its determination of the status of respondent under the Railway Labor Act establish that the Commission's findings are grounded upon unlawful tests. The lawful standards for the determination of an interurban electric railway are the physical and operating characteristics of such a railway as established by early authentic history, general usage and common understanding of the term, State and Federal statutes and administrative construction. These matters will be dealt with in the next section of this brief.

IV

CHARACTERISTICS OF AN INTERURBAN ELECTRIC RAILWAY

Interurban electric railways began to develop a year or so before the turn of the present century—about the year 1898 or 1899. By the year 1902 interurban electric railways were so well established and their physical and operating characteristics so well defined that the United States Government, Bureau of Census, in its official report for that year, published by authority of an act of Congress, under the heading "Street and Electric Railways, 1902" used the following language:

> "The electric interurban railways possess, in contrast with steam railroads, several peculiar characteristics which directly affect their method of operation

* * *. Small units and frequent service. Steam operation tends to infrequent service, while electric operation lends itself to frequent service. Frequency of stops. The fact that single units of comparatively light weight are operated permits stops to be made much more quickly than with heavy steam trains, and, likewise, permits a much more rapid acceleration after the start. Operation in the streets of towns and cities. By running upon the public streets when they enter a city or town and by making frequent stops within the municipal limits electric railways become usually much more accessible to passengers than steam railroads * * *. Other peculiarities of interurban railway service, * * *. One of these is the fact that the electric car can surmount grades and pass curves more readily than a steam train."

Again in the same Census Report for the year 1902 the lowing language appears, which emphasizes the fact that erurban electric railways were well constructed, partly private rights of way, and transported a substantial lume of freight:

"In the Central West at least 75 per cent of the interurban roads are located on private rights of way from 30 to 40 feet wide for single track on which a standard road bed is laid with 70 to 80 pound rails. As a general thing, the electric roads have been less careful than the steam roads to avoid grades and curves. The bridge construction along such roads, however, is very often of a superior character, consisting of steel girder construction and comparing favorably with steam railway practices. The most extensive development of freight and express business has taken place on the interurban lines. Many of the cars on these roads are ordinary freight cars with brake equipment, etc., similar to that on steam railways."

Thus in the year 1902 a Department of the United States Government recognized and officially reported the peculiar characteristics of interurban electric railways. These characteristics—"small units and frequent service, frequent stops, operating in the streets of towns and cities, heavy grades and short curves," are still the outstanding characteristics of interurban electric railways. They have been constantly recognized in State and Federal statutes—in court decisions and in the decisions of the Interstate Commerce Commission itself as cited in numerous instances.

In the year 1907 the Bureau of Census issued another official report with regard to electric railways and in it refers to such railways in the following language:

> "Of the total increase in track during the five year period which amounted to 11,826.57 miles, 60.6% was on private rights of way. The development of freight and express traffic on interurban and rural lines has resulted in a large increase in cars especially equipped for this service. * * * By the extent of their operations (interurban electric railways) rival main lines of steam railroad. The *variety of freight and express carried is remarkable and includes all kinds of commodities and merchandise.*" (Italics ours.).

Without laboring the subject unduly it may be further stated that the Bureau of Census issued another report in the year 1912 which again emphasized the growth of the industry and the freight development, all of which merely confirms the original recognition of the characteristics of interurban electric railways as set out in the Census Report for the year 1902.

In an early California case, *San Francisco Electric Railway Co.* v. *Scott*, 142 Cal. 222, the Court used this language:

"There has recently come into existence a certain class of railroad known as 'interurban roads' which are a sort of hybrid, having in some respects the characteristics of the ordinary railroad and in others those of the street railroads. Within the limits of the cities which they enter they usually pass along the streets and perform the ordinary functions of street railroads, stopping where desired, to let passengers on or off, and serving the public need for local street travel. * * * They also convey freight as well as passengers."

This Court, in June, 1913, recognized interurban railroads in *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, and stated that a new type of interurban railroad had been developed

"which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed."

Again, in June, 1916, this Court recognized the characteristics of interurban electric railways particularly as to freight transportation in *Spokane & Inland Empire* v. *United States,* 214 U. S. 344. That decision mentioned interurban electric lines operating passenger trains of two or more cars, under standard railroad rules, and freight trains which did not operate over city streets.

Two cases have reached this Court in recent years involving the question of the characteristics of an interurban electric railway. In one case, *Piedmont & Northern* v. *Interstate Commerce Commission,* 286 U. S. 299, decided in May, 1932, the carrier was held not to be an interurban electric railway largely because of the fact that it was proposing to construct some one hundred twenty-five miles

of new railroad which would connect two sections of an existing line and thereby reach an entirely new connection with the steam railroads which would have the effect of raiding the business of the existing steam railroads, to the extent of 82,320 cars a year, including 12,300 cars of bridge traffic. This Court, in that case, went on to say:

> "* * * in view of the declared policy of the act, we cannot hold it an 'interurban' railway within the exemption * * *. The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

In another case which reached this Court in recent years on the question of interurban electric railway characteristics—*United States* v. *Chicago, North Shore & Milwaukee Railroad Co.*, 288 U. S. 1, this Court, in determining that the North Shore was an interurban electric railway and therefore exempted from the provisions of Section 20a of the Interstate Commerce Act, used the following language:

> "The facts differentiate the present case from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U. S. 299. There the railway was predominantly a carrier of interchange carload freight, and *the proposed extension of line, which was the subject of that litigation, had as its object the creation of a link in a trunk line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk line routes some $4,000,000 of revenue annually.*" (Italics ours.)

Thus it will be seen that this Court in its *Piedmont & Northern* decision found that carrier not to be an inter-

urban electric railway largely because the construction of its new line would violate the "declared policy of the Act," with regard to the maintenance of a healthy national system of transportation. This *Piedmont & Northern* decision in no wise controverts the fact that interurban electric railways should be judged by their peculiar physical and operating characteristics. In that decision the Court made the declared policy of the Interstate Commerce Act with respect to the building of new lines a matter of paramount consideration in determining the right of the Piedmont & Northern to construct the line. The Court did not decide, in that case, that the question whether a particular electric line is an interurban electric line shall be determined by the relation of freight to passenger business.

It will thus be seen that, from their inception, interurban electric railways have possessed certain peculiar and outstanding physical and operating characteristics, which have been recognized by the Bureau of Census in official reports, by numerous State and Federal statutes, and by decisions of the various regulatory agencies, including the Interstate Commerce Commission. It was not until that Commission failed in its attempt to persuade Congress to adopt certain amendments to the Interstate Commerce Act with regard to interurban electric railways that any controversy arose concerning the characteristics of these railways.

In using the phrase "interurban electric railway" in the Electric Railway Mail Pay Act of 1918, in the amendments to the Interstate Commerce Act of 1920, in the Transportation Act, and later in the Railway Labor Act, Congress did not define its meaning. Therefore, under well settled canons of construction, it must be assumed that Congress used the phrase as descriptive of a class of independently operated electric railways, as that phrase and description had the sanction of time and common usage and a well un-

derstood meaning. Moreover, in the absence of any qualifying language, it must be assumed that Congress used the phrase in the sense that it had been used by the Interstate Commerce Commission, by the Bureau of Census, in State statutes and in decisions of this Court and of other courts. We have shown that over a long period of time prior to 1920 it was commonly recognized that interurban electric railroads were engaged to a very considerable extent in the transportation of freight in standard steam railroad equipment, and that such railways had joint freight rates and interchange facilities with steam railroads.

In the next section of this brief we shall undertake to show that the Interstate Commerce Commission has followed, during the past few years, a plan to accomplish by administrative construction, its recommended policy concerning these electric railways, which Congress has failed to adopt.

V

THE COMMISSION IS ATTEMPTING TO ESTABLISH BY ADMINISTRATIVE CONSTRUCTION ITS LEGISLATIVE RECOMMENDATIONS WITH REGARD TO INTERURBAN ELECTRIC RAILWAYS WHICH CONGRESS HAS FAILED TO ADOPT.

The Transportation Act, 1920, amended the Interstate Commerce Act quite extensively and in several sections excluded interurban electric railways from the provisions of such sections. It thereupon became the duty of the Interstate Commerce Commission, as a preliminary step in the enforcement of the sections of the act from which interurban electric railways are excluded, to determine what electric railways were included and which ones were excluded. The Commission's decisions in various cases be-

tween 1920 and 1926 indicate no confusion or misunderstanding in regard to the characteristics of interurban electric railways. *Michigan R. R. Co.* v. *Pere Marquette RR. Co., et al.*, 74 I. C. C. 496, decided November, 1922; *Application of Section 15a of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751, decided in 1924; *Electric Railway Mail Pay Case*, 98 I. C. C. 737, decided in 1925; *Application of Section 15a to Interstate Public Service Company*, 117 I. C. C. 228, decided in 1926.

In none of the cited cases did the Commission raise any question about the generally well-understood characteristics of interurban electric railways.

Meanwhile, however, in its annual reports to Congress, which are required by law, the Commission, in the year 1921, began to make recommendations for legislation to amend the Interstate Commerce Act, to remove exemptions contained in that act as to interurban electric railways engaged in the general transportation of freight.

In its annual report to Congress dated December 1, 1921, the following will be found:

> "Under the law as it now stands, we have no jurisdiction over * * * (an) interurban electric railway which is not operated as a part of a general steam railroad system of transportation. Certain electric railways independently operated are engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers. * * * *Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Under Section 15a of the act we are given authority to include in groups of carriers for rate making purposes such interurban electric lines as are engaged in the general transportation of freight.* It seems desirable that section 20a of the Interstate Commerce Act *be so amended as to indicate definitely*

the classes of electric railway companies subject to that section." (Italics ours.)

In its annual report to the Congress, dated December 1, 1922, the following language may be found:

> "Under the law as it now stands we have no jurisdiction over * * * (an) interurban electric railway which is not operated as a part of a general steam railroad system of transportation. * * * Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. *Unless such lines are held not to be street, suburban, or interurban electric railways they are not subject to our jurisdiction * * *. It is desirable that Section 20a of the Interstate Commerce Act be so amended as to also include explicitly electric railway companies engaged in the general transportation of freight.*" (Italics ours.)

So in December, 1922, after affirmatively stating that interurban electric railways are engaged in the general transportation of freight, and that some electric lines correspond substantially to steam roads, we find the Commission setting out the fact that unless such lines are held *not to be interurbans* that they are not subject to certain provisions of the Act. Following this is a specific recommendation asking Congress to amend the law to bring certain of these lines under the Commission's authority.

The Congress did not adopt the Commission's recommendations. No act was ever passed to comply with the Commission's conception of what was desired. On the other hand the Congress did adopt, after the year 1922, several statutes directly contrary to the Commission's recommendations, as will be hereinafter pointed out.

In 1923 and 1924 the Commission repeated its previous recommendations with regard to electric railways.

In 1925 the following significant recommendation is to be found:

> "*That section 20a* of the Interstate Commerce Act *be amended to include within its provisions* electric railway companies *engaged in the general transportation of freight.*" (Italics ours.)

This conclusively proves that at that time, in 1925, the Commission took the position that an electric railway company, even though engaged in the general transportation of freight, was excluded by the language of section 20a. It could *only have been considered as excluded because it was construed to be a "street, suburban or interurban electric railway" as only such electric railways were excluded by the provisions of that section.*

No specific recommendations were made in 1926 and 1927.

In 1928, however, a long statement was made by the Commission to Congress with regard to its jurisdiction over electric railways. After pointing out the various exclusion provisions of the Interstate Commerce Act, the Commission stated:

> "In the construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways. Practically all of the interurban electric lines of the country are engaged to a greater or less extent in the transportation of freight. * * * Certain electric railway lines for many years have engaged largely in freight transportation, their business being substantially the same as that of steam railroads, the only material difference being in motive power. *Where the functions of an electric line are substantially the same as those of an ordinary steam*

*railroad the public interest would seem to justify the exercise of our jurisdiction in the matters of securities, construction or abandonment, regulation of rates, recapture of excess earnings * * * to the same extent as in the case of steam railroads. * * * It is recommended that instead of attempting to define the classes of electric lines that are exempt from our jurisdiction under the several provisions in question, a general exemption of all electric lines be substituted, excepting such lines as interchange standard freight equipment with steam railroad lines and participate in through interstate freight rates with such lines."* (Italics ours.)

If the foregoing is not an admission by the Commission of its understanding of the legal meaning of the term "interurban electric railway" it is difficult to see what the Commission was attempting to do. Here is a specific statement of something that the Commission thought presented a real problem for the Congress to solve. It points the way that it would like to have the Congress act to accomplish the desired end, and that end is specifically set out to be the inclusion within the law of all interurban lines which interchange freight equipment with steam railroad lines and participate in through interstate freight rates with such lines.

Congress paid no attention to that recommendation. No act was passed at that time and none has ever been passed to make the Commission's recommendations effective; but several acts have been passed subsequent to 1928 in direct disregard of the Commission's suggestion.

The annual report of the Commission to Congress for the years 1929, 1930, 1931 and 1932 repeated the recommendations of the year 1928 set out above.

In the 1933 annual report, an interesting and significant statement is made with regard to the amendment that was passed by Congress in 1933 affecting section 19a of the

Interstate Commerce Act. Section 19a is the section which requires the Commission to make a valuation of all railroads subject to the act. As amended in 1933 the mandate of valuation with regard to interurban electric railways was removed and made a matter of discretion with the Commission.

This is what the Commission said in its 1933 annual report to Congress with regard to the amendment:

> "Paragraph (a) of Sec. 19a * * * formerly * * * directed us to value any street, suburban, or interurban electric railway * * *. Paragraph (a) as now amended leaves to our discretion the valuation of any such railway not operated as a part of a general steam railroad system of transportation."

The respondent has not been valued by the Commission and in fact no independently operated electric railway has been valued, since the mandate was removed. Unless these independently operated electric railways are interurban electric railways, the Commission has failed in its duty in not proceeding with their valuation. In other words, as to the valuation question, the Commission knows well enough what an interurban electric railway is and it has exercised its discretion with regard to them by not determining their value.

No recommendations were made by the Commission to Congress in 1934.

In 1935 again the Commission in its annual report discussed at considerable length the jurisdiction of the Commission over electric railways. It particularly referred to its previous recommendations with regard to clarifying amendments and specifically pointed out the action it took in finding that the Texas Electric Railway is not an interurban electric railway under the Railway Labor Act. The

Texas Electric Railway case was the first Railway Labor Act docket of the Interstate Commerce Commission and was decided March 16, 1925. That case is in litigation in the Federal District Courts and is standing still (awaiting a decision in this case) under a temporary injunction against the United States District Attorney for the Northern District of Texas, issued by the Federal District Court against the prosecution of that railway under the Railway Labor Act.

The respondent's case was the twelfth Railway Labor Act docket of the Commission and was decided in March, 1936.

In its 1935 annual report will be found the following significant language which seems conclusively to establish the fact that the Commission adopted its own suggestion made in the year 1922 for legislative amendment to the Interstate Commerce Act and in that manner, by administrative construction, proceeded to nullify the interurban electric railway exemptions. This is the language:

> "We renew our recommendation that the above provision of the act be clarified by appropriate amendment along the lines of our decision in *Texas Electric Railway*, 208 I. C. C. 193."

In other words, the Commission told Congress in that recommendation that it has, pursuant to a policy announced in the year 1922, proceeded to nullify by administrative construction, the provisions of various Federal acts and points specifically to its finding in 1935 in the *Texas Electric Railway Case*—sets out what its finding was—and then recommends that Congress pass a law approving the nullification. Congress did not pass the law.

It is interesting also to note at this point that in a series of findings affecting other electric lines some fifteen in

number, the Commission has cut the pattern of the finding the same as it started out with in the *Texas Electric Railway Case*. In line with its nullification policy, by administrative construction, it has held fourteen other electric railways *not* to be interurbans, and some of those lines, in addition to respondent and the Texas Electric, have sought relief from the unlawful action of the Commission in the Federal Courts. In one case only—that of the Chicago, North Shore & Milwaukee—the Commission found the line to be an interurban. But that finding was based largely upon the fact that the Supreme Court previously had so held.

In several cases in the Federal courts the Commission has been corrected in regard to its conception of an interurban electric railway, and, in fact, in no case arising under the Railway Labor Act has the Commission's finding been sustained. See *Hudson & Manhattan Ry. Co.* v. *Lamar Hardy, U. S. District Attorney,* 22 F. Supp. 105; *Texas Electric Railway Co.* v. *Clyde O. Eastus,* individually and as United States Attorney for the Northern District of Texas, No. 3662, unreported, temporary injunction granted; *Utah-Idaho Central* v. *Shields,* U. S. District Attorney, Federal District Court for District of Utah, Central Division, Equity No. 12924, unreported, decided October 15, 1936. Affirmed by United States Circuit Court of Appeals, Tenth Circuit, April 1, 1938. 95 F.(2d) 911.

As another illustration that in the year 1922 or 1923 the Commission had determined on the adoption of a policy of nullifying the legislative meaning of the phrase "interurban electric railway" in various Federal statutes, reference is made to the decision of the Commission in Ex Parte 38, the *Locomotive Inspection Case,* 122 I. C. C. 414. That case arose as the result of amendments to the Locomotive Inspection Act made by Congress in June, 1924.

The definition of the term "carriers" subject to the Locomotive Inspection Act as thus amended, was changed to exclude

> "street, suburban and interurban electric railways unless operated as a part of a general railroad system of transportation."

The word "steam" was omitted from the excluding language in the Locomotive Inspection Act. In September, 1926, that Act had been held by the Federal District Court to apply to electric as well as steam locomotives. *States Island Rapid Transit R. Co.* v. *Pub. Serv. Comm.*, 16 F.(2d) 313.

After an ex parte hearing concerning the application of the excluding language to interurban electric railroads, the Commission made a report in which it said:

> "In none of the acts mentioned, and in no other act with which we are familiar, has Congress used an expression identical with that used in the excluding clause of the Locomotive Inspection Act." 122 I. C. C. 414, 420.

It will thus be seen that in construing the excluding phrase in the Locomotive Inspection Act, the Commission was itself conscious of the fact that its decision should not be regarded as a precedent in determining the meaning of somewhat similar excluding language in other federal statutes. Moreover, it is well settled that laws designed to promote safety will be construed liberally so as to carry out the intent and purpose of Congress. Therefore the fact that in the *Locomotive Inspection Case* the Commission held that certain electric railways were not interurban electric railways, cannot fairly be regarded as a precedent.

In this connection it is interesting to note that late in 1926 the Commission decided that the Interstate Public Service Company was an interurban electric railway not engaged in general transportation of freight and was, therefore, not subject to section 15a of the Interstate Commerce Act, 117 I. C. C. 228, and that within three months from the date of that decision the Commission held in the *Locomotive Inspection Case* that that railroad was not an interurban electric railway. It is also appropriate to point out that one of the electric railways which the Commission held not to be an interurban electric railway and therefore, subject to the Locomotive Inspection Act, was held by this Court to be an interurban electric railway in *United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1.

As we have already shown, in recent years there has been no consistency by the Commission in determining the meaning of the phrase "interurban electric railway" as used in various statutes. In 1929 the Commission held that the Cincinnati & Lake Erie Railroad was an interurban electric railway excluded from section 1(22) and section 20a of the Interstate Commerce Act, 154 I. C. C. 603. In August, 1938, the Commission (Commissioner Porter dissenting) held that this railroad is not an interurban electric railway and is therefore subject to the Railroad Retirement Act and the Carriers' Taxing Act, despite the fact that there was no substantial change in the operation or physical characteristics of that carrier since 1929. In November, 1931, the Commission held the Youngstown & Suburban Railway to be an interurban electric railway excluded from section 1(22) of the Interstate Commerce Act, 175 I. C. C. 699. In August, 1938, in 227 I. C. C. 73, the Commission (Commissioner Eastman dissenting) held that the same railway, which had substantially the same physical and operating characteristics, was not an interurban electric railway.

VI

DECISION OF THE UNITED STATES RAILROAD LABOR BOARD, DECEMBER, 1920

The Transportation Act, 1920, in Title III thereof, set up the first United States Railroad Labor Board which had jurisdiction over the settlement of disputes between carriers and their employees. Interurban electric railways were excluded from the original Railroad Labor Board Act in said year, 1920, in the following language:

> "* * * except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Shortly after the passage of the Railroad Labor Act as part of the Transportation Act, 1920, a complaint was brought by union labor with regard to the status of interurban electric railways under the quoted exclusion language. In a decision rendered under date of December 11, 1920, Decision No. 33 (Docket 26-A), the Labor Board, without a dissenting voice, used the following language:

> "It is plain that Congress has dealt in discriminating language with interurban electric railways throughout the Interstate Commerce Act and the Transportation Act, 1920, and has consistently treated them differently from steam lines. Congress has done this because there is a material difference, generally speaking, between steam and electric roads in the matter of equipment, nature of service, and standards of employment. With a few exceptions, one service is general, the other is local. The difficulty is that a few electric railways have developed far beyond the original idea of an interurban. They have now come to rival many steam lines in service and size. And still

the definition of what is an interurban has likewise broadened, not only by popular conception, but by legal, statutory and executive decree, so that the Pacific Electric Railway Company operating upward of six hundred (600) miles of road, the Fort Dodge, Des Moines & Southern Railroad owning two thousand four hundred (2,400) box and coal cars, and the Spokane & Inland Empire Railroad Company, crossing State lines and operating passenger and freight trains, are all judicially labeled 'interurban'. It is difficult, if not impossible, to get away from this definition. All the respondents are electrically operated. Some have been judicially determined to be interurban; the remainder either are so similar in character that they cannot be successfully differentiated, or are otherwise clearly excluded by the words of the Act. Neither are the respondents operating as a part of any general steam railroad system of transportation. Therefore, the Labor Board must decide that it has no jurisdiction over any of these respondents, and it herewith dismisses the applications of the petitioners for further hearing."

No appeal to the courts was ever taken from that decision of the Labor Board in 1920 and when the Railroad Labor Act was repealed and the Railway Labor Act of 1926 was enacted in lieu thereof, the following exclusion language was adopted:

"* * * the term 'carrier' shall not include any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

It is a well-settled rule of construction that where an administrative interpretation of a statute exists at the time of its re-enactment in the same terms, Congress is presumed to have intended to adopt the administrative interpretation. (*National Lead Co.* v. *U. S.*, 40 S. Ct. 237; *McCaughn* v. *Hershey Chocolate Co.*, 51 S. Ct. 510, *Johnson* v. *Manhattan Railway Company*, 53 S. Ct. 721.

This rule is directly in point in this case, first because the 1920 Railroad Labor Statute was repealed and re-enacted in substantially the same language in 1926 and the exclusion language was identical except added language put in for the purpose of clarification.

Furthermore, when the 1926 Railway Labor Act was under consideration by Congress, the fact that the Railroad Labor Board had construed the exclusion language in 1920, was brought directly to the attention of the Committee, in open hearing. As finally adopted, the exclusion language of the 1926 act remained the same as it had been in the 1920 act. Therefore, Congress by re-enacting the statute, adopted the construction placed upon the prior statute by the Railroad Labor Board in 1920. (Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 69th Congress, 1st Session, on H. R. 7180, pages 24-34, pages 61-63.

The Railway Labor Act of 1926 was amended by the Act of June 21, 1934, which is the law governing the settlement of disputes between carriers and their employees at the present time. The exclusion language of the present act is:

> "* * * the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of trans-

portation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

It will be noted that the exclusion language itself is identical with the exclusion language of the 1926 Act and is no different in meaning than the exclusion language of the 1920 Act. The only addition is the proviso contained in the 1934 Act with regard to the function of the Interstate Commerce Commission.

The original Railroad Labor Board decision in December, 1920, stood through the entire life of the Railroad Labor Board, from 1920 to 1926. It stood through the entire life of the Board of Mediation, created by the act of 1926, to 1934. In other words, the decision of the Railroad Labor Board in 1920 held through and was uncontested for a period of fourteen years, and during the intervening time the Congress, with particular notice to it in regard to the matter, had re-enacted the statute in 1926 and again in 1934 upon the basis of the 1920 decision.

So in the year 1935—fifteen years after the first Railroad Labor Act, excluding interurban electric railways, was enacted—despite the fact that the Railroad Labor Board in a formal decision in 1920 construed the term "interurban electric railway" and despite the fact that Congress re-enacted the statute in 1926 and 1934, and thus adopted the Labor Board decision—the Commission brushed aside the precedent and made a finding designed to support a policy of nullification of the law by administrative construction.

VII

THE COURTS HAVE JURISDICTION TO MAKE A DE NOVO DETERMINATION OF THE STATUS OF RESPONDENT UNDER THE RAILWAY LABOR ACT.

As already pointed out in the fore-part of this brief, the Interstate Commerce Commission, upon request of the Mediation Board and after hearing determined that the respondent is not an interurban electric railway.

Section 2, Tenth, of the Railway Labor Act declares that the wilful failure or refusal of any carrier or its officers to comply with the terms of certain provisions of that act shall constitute a misdemeanor and, on conviction, shall subject the carrier or its officer, etc., to a fine of not less than $1,000 or more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day shall constitute a separate offense.

The bill of complaint alleges, and sets out facts to show that respondent is and always has been an interurban electric railway not operated as a part of a general steam railroad system of transportation, is not subject to the provisions of the Railway Labor Act, and for that reason has not complied with such provisions. The petitioner herein who was defendant in the lower court, answered the complaint and admitted that it is his duty to enforce the fines and penalties provided by the Act for non-compliance with its provisions and that he would proceed to do so against the respondent unless restrained by the Court. The Court of first instance heard the parties on respondent's application for a temporary injunction, as the result of which an injunction was issued by that Court and a final decree entered which was sustained by the Court of Appeals. The

Bill of Complaint as amended also alleged that if respondent is subject to the Railway Labor Act certain provisions of that act violated the 5th and 7th amendments of the Constitution of the United States and that the finding made by the Interstate Commerce Commission, that respondent is not an interurban electric railway is neither binding nor conclusive on the Court for the reason that the Court not only has jurisdiction to make an independent decision of the question involved, but, in any event, is required by the issues raised in the pleadings to make an independent decision of the question, in order to determine whether it should consider the constitutional objections which respondent has made to the statute.

In other words, if this Court should conclude that the Court below must consider the report and findings made by the Interstate Commerce Commission as well as the evidence on which the Commission acted, which the Court below in fact did, the position of the respondent is that the finding of the Commission is arbitrary and capricious in that it is contrary to the law, is not based on evidence and is contrary to the evidence. However, in view of the decision of the Court in *Shannahan, Trustee,* v. *United States,* 58 S. Ct. 782, involving the status of the Chicago, South Shore & South Bend Railway, it is clear that the Courts below did not err in considering the questions involved *de novo* and in making an independent determination of them.

The following points must be considered and must be decided by the Court before it reaches the constitutional questions:

1. By the proviso in Section 1, First, of the Railway Labor Act, did Congress confer on the Interstate Commerce Commission the exclusive authority to determine whether a particular electric railway is an

interurban electric railway not operated as a part of a general steam railroad system of transportation?

2. If the authority of the Commission is not exclusive or final, did the Courts below have the right and the authority to consider and decide *de novo* the question whether the respondent is an interurban electric railway not operated as a part of a general steam railroad system of transportation, or must the Courts consider and determine whether the decision of the Commission is valid and according to law, or is arbitrary and contrary to the evidence and contrary to the law, etc?

3. In view of the constitutional questions raised by the bill of complaint as amended, the Courts below were bound to consider and determine *de novo* whether the respondent is an interurban electric railway, in order to decide the right of the respondent to raise such questions.

These points will be discussed in the order stated.

Points 1 and 2 are related and will be discussed together. The phrase in the proviso of Section 1, First, of the Railway Labor Act, to the effect that the terms of that Act shall not include "any street, interurban or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation" is substantially the same in language as similar phrases in Section 1(22), in Section 20a of the Interstate Commerce Act, in the Locomotive Inspection Act, in the Railroad Retirement Act, in the Carriers Taxing Act, and in other acts of Congress.

This suit is neither a direct nor a collateral attack on the determination made by the Commission as to the status of the respondent under the Railway Labor Act. That act contains no provision for judicial review. That fact does not deprive respondent of the right of a judicial review on the

questions involved which, in effect, call for decision as to whether respondent falls within the Railway Labor Act as determined by the Commission or the National Labor Relations Act. *Ohio Valley Co.* v. *Ben Avon*, 253 U. S. 287. Respondent could have maintained this suit against petitioner Shields, even if the Commission had not made the determination, if Shields had threatened to prosecute respondent for non-compliance with the provisions of the Railway Labor Act. The reference to the determination by the Commission in the court of first instance was brought in by the answer of petitioner, Shields, and the Commission as an intervener.

Petitioners are in an anomalous position. On the one hand they concede, as they must under *Shannahan* v. *United States*, 303 U. S. 596, that the determination by the Commission under the Railway Labor Act may not be directly attacked under the Urgent Deficiencies Act. On the other hand petitioners insist that, because the proviso in the Railway Labor Act authorizes the Commission to determine, upon an appropriate request or complaint of an interested party, after hearing, whether a particular electric line falls within the exemption, the action of the Commission, when made, is exclusive and binding on the courts, and that the function of the Commission in making such a determination differs from its function under almost identical language in various sections of the Interstate Commerce Act and the Transportation Act, for the reason, as petitioners say, that the latter acts do not in terms authorize the Commission to make the determination. This is a distinction without a difference. The fact that the provisions of the Interstate Commerce Act and certain other related acts which exclude interurban electric railways do not, in terms, authorize the Commission to decide such question is unimportant and immaterial because the authority to do so

under those acts is there by necessary implication. This was clearly recognized by this Court in *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1, where the Court said:

> "The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under section 20 (a) for the issuance of securities".

In either event the question whether an electric line is an interurban electric railway is a mixed question of law and fact which may be determined by the courts *de novo*. *United States* v. *State of Idaho*, 298 U. S. 105; *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1; *Texas & Pacific R. Co.* v. *G. C. & S. F. R. Co.*, 270 U. S. 266; *Piedmont & Northern R. Co.* v. *I. C. C.*, 286 U. S. 299; and *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. *Tap Line Cases*, 234 U. S. 1.

The function of the Commission under the Railway Labor Act is in all essential respects similar to its function under the Valuation Act. Under either act its determination is no more binding on the Court than was the action of the Commission in *Shannahan, Trustee* v. *United States*, 303 U. S. 596; *United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299; *United States* v. *A. B. & C. Ry. Co.*, 282 U. S. 522; *Great Northern* v. *United States*, 277 U. S. 172; and *Piedmont & Northern Rwy. Co.* v. *United States*, 280 U. S. 469.

Petitioners say that by delegating to the Commission in the Railway Labor Act, the Railroad Retirement Act, and the Carriers' Taxing Act the authority, under the circumstances described in those acts, to determine the status of an electric railway, indicates that Congress has abandoned the attempt made in the Bankruptcy Act of 1933 and sev-

eral sections of the Transportation Act "at exact definition, and has left the question to the Interstate Commerce Commission to decide, * * * with knowledge of the manner in which the Commission had decided similar questions in the past." Petitioners are entirely wrong in this contention. In the Fair Labor Standards Act of 1938, Section 13(a), Congress excludes from the terms of that act employes of a street, surburban or interurban electric railway, and it did not in that act confer on the Interstate Commerce Commission authority to make the determination. This contention by petitioners also loses sight of the fact that Section 77 of the Bankruptcy Act, as amended in August, 1935, contains the same definition as was included in that section of the Bankruptcy Act of 1933, which, as elsewhere pointed out, excludes from the term "railroad" an interurban electric railway which is not operated as a part of a general steam railroad system, or which does not derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad equipment, thus clearly recognizing that an electric line may be an interurban electric railway, even though it derives most of its revenue from freight transported in standard railroad equipment.

Petitioners repeatedly refer to the decision of the Commission in the *Locomotive Inspection Act Case*, 122 I. C. C. 414, for the purpose of emphasizing that in that case the Commission held that the respondent was not an interurban electric railway under that act. The Commission also held that the Chicago, North Shore & Milwaukee Railroad Company was not an interurban electric railway company under that act, and then, a few years later it held that the North Shore is an interurban electric railway excluded from the provisions of the Railway Labor Act, 219 I. C. C. 135. And, as has already been shown, this Court made a

like finding in *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1. Other inconsistent findings by the Commission in respect to the status of the Cincinnati & Lake Erie Railway, the Interstate Public Service Company, the Youngstown & Suburban Railroad and other carriers have been referred to earlier in this brief.

Petitioners insist that Congress was aware of the effect of permitting the Commission to make decisions which would determine the status of electric railways under the Railway Labor Act because of certain statements made by interested persons before congressional committees. Specifically, petitioners say that such a delegation of authority was supported before the committee considering the bill by George M. Harrison, representing railroad employees' organizations, and was opposed by C. D. Cass, one of counsel for *amicus curiae*. These statements are true but are here unimportant, because under the doctrine of *Duplex Printing Press* v. *Deering*, 254 U. S. 443, and other cases, the rule is that statements made before a committee of Congress are not admissible as an aid to the interpretation of a statute which is doubtful or obscure.

Petitioners also rely on *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 541; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Florida* v. *United States*, 292 U. S. 1; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, and other cases, as authority for the proposition that a determination by the Commission under the Railway Labor Act is binding on the courts, at least if supported by substantial evidence, and is neither arbitrary nor capricious. These cases deal with orders of the Commission where it exercised administrative authority in respect to rates, regulations and practices. It is, of course, settled that where a tribunal like the Commission exercises that

character of authority its orders will be sustained by the courts, if supported by substantial evidence, unless contrary to law, arbitrary, etc. But these decisions are inapplicable to the question involved because whether a particular carrier is an interurban electric carrier or, for that matter is a common carrier, is not an administrative but is a judicial question. *Tap Line Cases*, 234 U. S. 1; *United States* v. *State of Idaho*, 298 U. S. 105; *Texas & Pacific* v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266; *Piedmont & Northern R. Co.* v. *I. C. C.*, 280 U. S. 249; *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1.

In the Idaho case an application was filed with the Commission by the railroad for a certificate to abandon certain tracks. Spur, industrial, switching or side tracks are excluded from the provisions of Section 1(22) of the Interstate Commerce Act. Although it was urged before the Commission in that case that the tracks there sought to be abandoned were spur, industrial, switching or side tracks, the Commission held to the contrary, assumed jurisdiction and issued the certificate. Whereupon the State of Idaho brought a suit against the United States under the Urgent Deficiencies Act in a three judge Court. Both the Government and the Commission contended in that suit, as petitioners contend here, that as the order of the Commission was based on evidence and was not shown to be arbitrary, the Court was bound to sustain it. This Court rejected that contention, and, as already pointed out, held that whether the tracks were spur, side or switching tracks was a mixed question of law and fact, left by Congress to the decision of a court. It then proceeded to find that the tracks were spur, or industrial tracks, not within the jurisdiction of the Commission. The Court also intimated in that case that the suit by the State of Idaho could have been maintained in a single judge court, and that in the

circumstances it was not necessary that a direct attack on the order of the Commission be made as was done in another judge court.

It requires no argument to show that there is no difference in principle between the function of determining whether a particular track is a spur track, and the function of determining whether a particular railroad is an interurban electric railroad.

In *Powell, et al.*, v. *United States*, 300 U. S. 276, the Court held that the question whether a particular extension of a railroad was within or without the excluding language of Section 1(22) of the Interstate Commerce Act is for a court to decide; that it is the function of the court to construe that paragraph; and that the only function of the Commission under the paragraph is to determine whether the proposed extension, if covered by the paragraph, is in the public interest. The court, of course, recognized as it had before, that the Commission may determine the meaning of that paragraph as an incident to its determination of its jurisdiction.

It is therefore clear that as the Railway Labor Act excludes from its provisions interurban electric railways not operated as a part of a general steam railroad system, the question whether a particular electric railroad is an interurban electric railroad within the meaning of the excluding language of that Act is a mixed question of law and fact, just as it is where similar excluding language is used in provisions of the Interstate Commerce Act, and, to the extent that it involves a question of fact, it is a jurisdictional fact which under the doctrine of *Crowell* v. *Benson*, 52 S. Ct. 285, 297, and *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 74-75, the Courts have the right to determine *de novo*. In *Crowell* v. *Benson* the Court had this to say on that subject:

"In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute."

The Railway Labor Act confers no administrative authority on the Interstate Commerce Commission. Its authority under that act to determine the status of an electric line exists only, if and when the Mediation Board requests it to do so, or when a complaint of an interested party is filed with the Commission. In the circumstances, it is obvious that the mere delegation to the Commission of the authority to do certain things under the Railway Labor Act, if and when certain machinery is put in motion, does not make its decision any more exclusive or final under that Act than is its decision on a similar question to determine its jurisdiction with respect to certain electric lines under the provisions of the Interstate Commerce Act where similar language is used.

There is nothing in the proviso of Section 1 of the Railway Labor Act which indicates any intention on the part of Congress to make the determination by the Commission in a particular case exclusive or final. When Congress intends to delegate final authority to an administrative agency with respect to a particular subject it shows that intention in plain language. For example, in Section 10(a) of the National Labor Relations Act, where the board created by that act is authorized to do certain things, Congress provided:

"This power shall be exclusive and shall not be affected by any other means of adjustment or prevention

that has been or may be established by agreement, code, law or otherwise."

Shamahan, Trustee. v. *U. S.*, 303 U. S. 596, was a suit brought against the United States under the Urgent Deficiencies Act in a three judge court to enjoin and set aside the determination made by the Interstate Commerce Commission of the status of the Chicago, South Shore & South Bend Railroad, under the very provisions of the Railway Labor Act which are here considered. That suit was based on the theory that the determination by the Commission was an order which had to be attacked directly in a suit under the Urgent Deficiencies Act. The Court held that the determination by the Commission under the Railway Labor Act was not an order, and in doing so made the following significant statement:

> "First. The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative'. *United States* v. *Illinois Cent. Ry.*, 244 U. S. 82, 89; *United States* v. *Atlanta, B. & C. Ry.*, 282 U. S. 522, 527-528. Compare *Lehigh Valley R. R.* v. *United States*, 243 U. S. 412, 414. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in some proceeding which may be instituted in the future.' *United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299, 310."

As this Court has already decided that a determination by the Commission under the Railway Labor Act neither commands or directs anything to be done, but "is mere preparation for possible future action" it certainly cannot be said that a determination by the Commission under that

act is final or exclusive, or that it prevents a court from considering and deciding *de novo* the question whether a particular electric line is or is not an interurban electric line excluded from the provisions of that act.

3. As has already been pointed out, the bill of complaint as amended alleges that certain of the provisions of the Railway Labor Act violated the Fifth and Seventh Amendments to the Constitution. It is, therefore, apparent that irrespective of the points made in the preceding paragraphs the Court must determine under the pleadings as they stand whether the respondent is or is not an interurban electric railway in order for the court to reach the point of considering the constitutional objections. In other words, if as alleged in the bill of complaint the respondent is an interurban electric railway, and the court sustains the decisions of the courts below, then the Court need not consider the constitutional questions. In these circumstances, under any view that may be taken of the jurisdictional question which has been discussed, it is clear that the Court is required to decide the basic question whether or not the respondent is or is not an interurban electric railway as that phrase is used in the Railway Labor Act.

The decisions of the courts below are correct both on the jurisdictional question and on the merits. It has already been shown that the courts below had authority and jurisdiction to consider and determine *de novo* the questions involved.

The courts below were also correct in their decisions on the merits because the facts before the court show beyond question that the respondent is now, and always has been, an interurban electric railway not operating as a part of a general steam railroad system of transportation, and therefore is excluded from the provisions of the Railway Labor Act.

The courts below have given the term "interurban electric railway," as used in the Railway Labor Act its plain, natural and lawful meaning. On the other hand, as we have already shown, the Interstate Commerce Commission has disregarded the plain, natural and lawful meaning of this term and has used an unlawful and unwarranted standard by which to decide the question.

VIII

CONCLUSION

In its zeal to force the establishment of its policy in regard to interurban electric railways, despite the fact that, for fifteen years, Congress has ignored the Commission's legislative recommendations in respect thereof, and despite the further fact that meanwhile Congress has adopted statutes emphasizing a much broader legal meaning of the term than the Commission's construction (Section 77 of the Bankruptcy Act, 1935), the Commission has obviously, in pursuing its nullification policy given little if any consideration to the catastrophic effect of its interpretation of the term upon the respondent and upon electric railway carriers generally.

Here are electric railway carriers, the respondent, as well as a large class of such carriers, which for many years have been commonly known as and considered by themselves and others to be interurban electric railways, exempted from the provisions of numerous State and Federal statutes (Appendix B and Appendix C). Suddenly, without substantial change in their physical and operating characteristics, they are advised that they are no longer interurbans and that the exemptions do not apply. The results are menacing, indeed.

If this respondent and that class of electric carriers are not interurban electric railways then for a great many years they have been in open and flagrant violation of a multiplicity of State and Federal laws. Their State and municipal franchises authorizing interurban electric railway operations are void. Their right to conduct an interurban electric railway business, when their charters so authorize, is nullified. Any securities they may have issued without the Commission's approval are invalid and their officers and agents are subject to drastic penalties. Any extensions or abandonment of lines which they may have made without the Commission's certificate of convenience and necessity have been unlawful. Their non-compliance with the Adamson Eight-Hour Law has been illegal. Their non-compliance with the two former Railroad Labor Acts for fifteen years, and the construction placed upon those statutes by the two former Railroad Labor Boards, were unlawful. Their special treatment as interurban electric railways under State laws by numerous decisions of State courts will be subject to reversal. Their payment of tax under the Social Security Act instead of under the Carriers Taxing Act are illegal. Their submission to the National Labor Relations Act instead of the Railway Labor Act is illegal. These and many other unanticipated ramifications may ensue from a failure to sustain the lower courts in this case.

Resting securely for many years in the belief that it is an interurban electric railway, the respondent in this case, and other electric carriers of the same class, in good faith, have depended upon the various exemptions in the law.

Truly, if this Court should hold that the Interstate Commerce Commission has unbridled power under the proviso of section 1, First, of the Railway Labor Act, to impose with all finality, its construction of the meaning of the term "interurban electric railway", a Pandora's box of ills will

be opened for these carriers, the result of which will be catastrophic beyond measure.

Respectfully submitted,

ROBERT E. QUIRK,
CLAUDE D. CASS,
Counsel for Amicus Curiae.

October 10, 1938.

APPENDIX A

Electric Railway Companies, Engaged in Interstate Commerce to Some Extent, Which Are Members of The American Transit Association.

Atlantic City & Shore Railroad Company	New Jersey
Bamberger Electric Railroad Company	Utah
Cedar Rapids & Iowa City Railway	Iowa
Chicago, North Shore & Milwaukee Railroad Company	Illinois
Chicago, South Shore & South Bend Railroad	Indiana
Cincinnati & Lake Erie Railroad Company	Pennsylvania
Cincinnati, Newport & Covington Railway Company	Kentucky
Co-Operative Transit Company	West Virginia
Dayton-Xenia Railway Company	Ohio
Delaware Electric Power Company	Delaware
Denver & Intermountain Railroad Company	Colorado
East Bay Transit Company	California
Fonda, Johnstown & Gloversville Railroad Company	New York
Fresno Traction Company	California
Indiana Service Corporation	Indiana
International Railway Company	New York
Kansas City Public Service Company	Missouri
Key System	California
Lackawanna & Wyoming Valley Railroad Company	Pennsylvania
Lehigh Valley Transit Company	Pennsylvania
Milwaukee Electric Railway & Light Company	Wisconsin
Northern States Power Company	Minnesota
Oakland Terminal Railroad Company	California
Ohio Public Service Company	Ohio
Pacific Electric Railway Company	California

Petaluma & Santa Rosa Railroad Company	California
Philadelphia & Western Railway Company	Pennsylvania
Potomac Edison Company	Maryland
Salt Lake & Utah Railroad Corporation	Utah
South Brooklyn Railway	New York
Steubenville, East Liverpool & Beaver Valley Traction Co.	Ohio
St. Louis & Belleville Electric Railway Company	Illinois
Texas Electric Railway	Texas
Waterloo, Cedar Falls & Northern Railway Company	Iowa
Utah-Idaho Central Railroad Company	Utah
York Utilities Company	Maine

APPENDIX B

Sections of Federal Statutes Specifically Mentioning or Exempting Interurban Electric Railways

RAILWAY LABOR ACT (1934)

APPROVED JUNE 21, 1934

Section 1, First.

"*Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

* * * * * *

(For the convenience of the Court the Railroad Labor Acts of 1920 and 1926, which were superseded by the above Railway Labor Act of 1934 are also quoted)

* * * * * *

RAILROAD LABOR ACT (1920)

APPROVED FEBRUARY 28, 1920

Section 300—Sub-section 1

"The term 'carrier' includes * * *, any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

RAILROAD LABOR ACT (1926)

APPROVED MAY 20, 1926

Section 1, First

"*Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

* * * * * *

INTERSTATE COMMERCE ACT

PART I

AMENDMENT TO SECTION 15(3)

APPROVED JUNE 18, 1910

AS SLIGHTLY MODIFIED IN 1920, BUT NOT CHANGED AS TO ELECTRIC RAILWAYS

"The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character;"

* * * * * *

ADAMSON EIGHT-HOUR ACT

APPROVED SEPTEMBER 5, 1916

Section 65.

"Eight hours shall, * * *, be deemed a day's work * * * for the purpose of reckoning the compensation

for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except * * *, electric street railroads and electric interurban railroads,"

* * * * * *

FEDERAL CONTROL ACT

APPROVED MARCH 21, 1918

From Section 1.

"*Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both."

* * * * * *

RAILWAY MAIL SERVICE PAY ON URBAN AND INTERURBAN ELECTRIC RAILWAYS ACT

APPROVED JULY 2, 1918

Section 570.

"The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter by urban and interurban electric railway common carriers * * *."

* * * * * *

INTERSTATE COMMERCE ACT

PART I

SECTION 1 (22)

APPROVED FEBRUARY 28, 1920

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not

extend to the construction or abandonment * * * of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

* * * * * * *

INTERSTATE COMMERCE ACT
PART I

SECTION 15A

APPROVED FEBRUARY 28, 1920
AMENDED JUNE 16, 1933

(The following language is not now in the section)

"* * *; the term 'carrier' means a carrier by railroad * * *, excluding * * *, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight * * *"

* * * * * * *

INTERSTATE COMMERCE ACT
PART I

SECTION 20A

APPROVED FEBRUARY 28, 1920

"* * * the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) * * *"

TRANSPORTATION ACT, 1920

APPROVED FEBRUARY 28, 1920

Section 204.

"The term 'carrier' means a carrier by railroad * * *; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"

* * * * * * *

TRANSPORTATION ACT, 1920

APPROVED FEBRUARY 28, 1920

Section 209.

"The term 'carrier' means (1) a carrier by railroad * * *; but does not include a street or interurban electric railway * * *, which has as its principal source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"

* * * * * * *

LOCOMOTIVE INSPECTION ACT

AS AMENDED

APPROVED JUNE 7, 1924

Section 22.

"* * *, the terms 'carrier' and 'common carrier' mean a common carrier by railroad, * * *, excluding street, suburban, and interurban electric railways un-

less operated as a part of a general railroad system of transportation."

* * * * * * *

BANKRUPTCY ACT

AS AMENDED

SECTION 77 (R)

AS APPROVED MARCH 3, 1933

"The term 'railroad corporation' * * * means any common carrier by railroad * * *, except a street, suburban or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."

* * * * * * *

INTERSTATE COMMERCE ACT
PART I

SECTION 19(A) AS AMENDED

APPROVED JUNE 16, 1933

"That the Commission shall, * * *, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this part, except any street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Commission may in its discretion investigate, ascertain, and report the value of the property owned or used by any such electric railway subject to the provisions of this part whenever in its judgment such action is desirable in the public interest."

BANKRUPTCY ACT

AS AMENDED

SECTION 77 (M)

AS APPROVED AUGUST 27, 1935

"The term 'railroad corporation' * * * means any common carrier by railroad * * *, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."

* * * * * * *

RAILROAD RETIREMENT ACT OF 1937

AS APPROVED JUNE 24, 1937

Section 1(a)

"*Provided, however,* That the term 'employer' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

* * * * * * *

CARRIERS TAXING ACT OF 1937

APPROVED JUNE 29, 1937

Section 1(a)

"*Provided, however,* That the term 'employer' shall not include any street, interurban, or suburban elec-

tric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Commissioner of Internal Revenue, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

* * * * * * *

INTERSTATE COMMERCE ACT
PART I

SECTION 26

APPROVED AUGUST 26, 1937
(BLOCK SIGNALS)

Section 26(a)

"*Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of a general steam-railroad system of transportation now or hereafter operated by any other motive power."

* * * * * * *

FAIR LABOR STANDARDS ACT OF 1938
APPROVED JUNE 25, 1938

Section 13(a)

"The provisions of sections 6 and 7 shall not apply with respect to * * *; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section;"

Section 1(a)

"*Provided, however*, That the term 'employer' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

APPENDIX C

Some State Statutes Relating to Interurban Electric Railways

(NOT INTENDED TO BE EXHAUSTIVE)

"The term 'railroad' when used in this Act includes every commercial, interurban and other railway other than a street railroad * * *."

(Chap. 896, Revised Statutes of California.)

"The term 'interurban railroad' as used in this Act shall be construed to mean any railroad, except a street railroad, which uses electricity as a motive power."

(Indiana Statutes Acts 1921, Chap. 224.)

"All interurban electric railroad companies authorized to construct a railroad ten or more miles in length * * * shall be under the same duties and responsibilities * * * and shall have the same rights, powers

and privileges * * * conferred upon railroad corporations."

(Kentucky Statutes, Sec. 842a-1.)

"The term 'railroad' * * * includes every commercial, interurban, or other railway other than a street railroad * * *."

(Revised Statutes of Maine, Chap. 62, Sec. 15.)

"* * * the Commission may * * * require steam railroads and interurban and suburban railroads to interchange cars * * *. and interurban railroads may be used for handling freight in carload lots in steam railroad freight cars * * *."

(Michigan Statutes, Chap. 208, Sec. 22, 26.)

"The term 'interurban railway' as used in this Act shall * * * mean a railway operated by electricity for the carriage of passengers, freight, mail and express between two or more municipalities * * * upon a private right of way or partly upon a private right of way and partly upon a public way."

(Compiled Statutes of Nebraska, Sec. 74-1201.)

"When engaged in the business of operating a railroad * * * whether constructed upon the public highway or upon private rights of way * * * using electricity or other motive power than animal or steam power for the transportation of passengers, packages, express matter, United States mail, baggage and freight, is an interurban railroad company and included in the term 'railroad' * * *."

(Ohio Code, Sec. 614-2.)

"Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city and town to another city, town or village * * *, shall be known as an interurban railway * * *."

(Section 2033a, Iowa Statutes.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

JOHN B. SHIELDS, individually and as United States Attorney for the District of Utah, and INTERSTATE COMMERCE COMMISSION,

Petitioners,

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION OF WM. D. WHITNEY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

WM. D. WHITNEY, *amicus curiae*, as counsel for Hudson & Manhattan Railroad Company.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the brief.

TABLE OF CONTENTS

	PAGE
ption for Leave to File Brief as *Amicus Curiae*...	1
ief of Wm. D. Whitney as *Amicus Curiae*	2
e Brief Relates to Procedure Only	2
Status of the Hudson & Manhattan	3
Statement of This Case	3
Procedural Questions Presented	6
Summary of Argument	8
Argument	11
POINT I.—The determination of the Interstate Commerce Commission does not preclude all judicial consideration of the Utah Idaho's status	11
POINT II.—Equity provides the appropriate forum for judicial review	19
POINT III.—The nature of the record upon which the court of equity shall determine the question	24
POINT IV.—The Commission's determination, however persuasive, is without any binding force in the courts	25
POINT V.—In any event, the meaning of the exemption proviso of the Railway Labor Act presents a question for decision by the Court	27
(1) The Construction of the Proviso in Paragraph First of Section 1 of the Railway Labor Act Presents a Question of Law for the Independent Judgment of the Courts	29

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(2) The Function of the Interstate Commerce Commission in Making a Determination of Status Under the Railway Labor Act is Not an Exercise of Regulatory Power or Administrative Discretion; and the Rules Relating to Judicial Review of Regulatory Action and Administrative Discretion Are Inappropriate in the Present Situation .....

(3) The Determination of the Interstate Commerce Commission is Merely the Equivalent of One Which Any Government Body Impliedly Possesses to Decide upon the Applicability of a Statute Administered by It .....

(4) Judicial Review of the Determinations of the Interstate Commerce Commission Tends to Insure Uniformity of Construction .....

TABLE OF CASES CITED

Acker v. *United States*, 298 U. S. 426.....

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 109.....

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658, 666.....

Butte, Anaconda & Pacific Railway Company v. *United States*, 290 U. S. 127.....

Carmichael v. *Southern Coal & Coke Company*, 301 U. S. 495 .....

Central Railroad Co. of New Jersey v. *United States*, 257 U. S. 247, 256-257.....

PAGE

Chicago Junction Case, 264 U. S. 258, 264 ..... 35, 40
Chicago North Shore & Milwaukee Railroad Company, 219 I. C. C. 135 ..... 48, 50
Cincinnati, etc. Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184, 196 2
Crowell v. *Benson*, 285 U. S. 22, 65 ..... 2, 17

Decatur v. *Paulding*, 14 Pet. (39 U. S.) 495, 516 19
De Groot v. *United States*, 5 Wall. 419, 431-433 18

East Tennessee, Virginia and Georgia Railway Co. v. *Interstate Commerce Commission*, 181 U. S. 1, 12 .. 41
Ex parte Bakelite Corporation, 279 U. S. 438, 451 17
Ex parte Young, 209 U. S. 123 22

Federal Radio Commission v. *General Electric Company*, 281 U. S. 464 40
Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 22
Florida v. *United States*, 292 U. S. 1 37
Florida East Coast Line v. *United States*, 234 U. S. 167, 185 30

Georgia Public Service Commission v. *United States*, 283 U. S. 765 ..... 37, 46
Great Northern Railway Co. v. *Merchants Elevator Co.*, 259 U. S. 285, 290, 292 ..... 29, 31, 47
Great Northern Railway Company v. *United States*, 277 U. S. 172 18

Helvering v. *Carter*, 298 U. S. 238 22
Houston v. *St. Louis Independent Packing Co.*, 249 U. S. 479 35
Hudson & Manhattan Railroad Company v. *Hardy* (S. D. N. Y.) 22 Fed. Supp. 105 ..... 3, 24

Illinois Central Railroad Company v. *Interstate Commerce Commission*, 206 U. S. 441, 414 29

PAGE

Interstate Commerce Commission v. *Alabama Midland Railway Company*, 168 U. S. 144, 170..... 39
Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42..... 39
Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227, U. S. 88, 91-92. 16

Lehigh Valley Railroad Company v. *United States*, 243 U. S. 412, 414..... 20

Manufacturers Railway Company v. *United States*, 246 U. S. 457, 481-482..... 38
Marbury v. *Madison*, 1 Cranch. 137, 178..... 32
Mississippi Valley Barge Company v. *United States*, 292 U. S. 282..... 37
Morgan v. *United States*, 298 U. S. 468, 481-.....16, 37

Northern Pacific Railway Company v. *Solum*, 247 U. S. 477, 483..... 35

Ohio Valley v. *Ben Avon Borough*, 253 U. S. 287, 294, 295..... 20
Omaha & Council Bluffs Street Railway v. *Interstate Commerce Commission*, 230 U. S. 324..... 34

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 420.... 16
Petroleum Exploration, Inc. v. *Public Service Commission of Kentucky*, 304 U. S. 209..... 22
Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U. S. 299.....26, 34, 43, 46, 47, 48

A. L. Schechter Corp. v. *United States*, 295 U. S. 495, 529..... 16
Seaboard Air Line Railway Company v. *United States*, 254 U. S. 57.....37, 39
Shannahan v. *United States*, 303 U. S. 596
3, 7, 19, 20, 26, 27, 28

PAGE

Smyth v. *Asphalt Belt Railway Co.*, 267 U. S. 326, 328-9 32
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 51 ..... 16, 37
Standard Oil Company (Indiana) v. *United States*, 283 U. S. 235, 238 31
Steward Machine Co. v. *Davis*, 301 U. S. 548 13

Tap Line Cases, 234 U. S. 1 30
Texas & Pacific Railway Company v. *American Tie & Timber Co., Ltd.*, 234 U. S. 138 31
Texas & Pacific Railway Company v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266 31, 35, 43, 46, 48
Texas & Pacific Railway Company v. *Interstate Commerce Commission*, 162 U. S. 197, 210 29

United States v. *Babcock*, 250 U. S. 328 18
United States v. *Dickson*, 15 Pet. 141, 162 30
United States v. *Idaho*, 298 U. S. 105, 109 24, 32, 33, 43, 46, 48
United States v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1 29, 34, 43, 46, 47, 48
United States v. *Pennsylvania Railroad Company*, 242 U. S. 208, 236 30

Virginian Ry. Co. v. *System Federation*, 300 U. S. 515, 542 ..... 2, 4, 19
Virginian Railway Company v. *United States*, 272 U. S. 658, 663 46

Wadley Southern Railway Company v. *Georgia*, 235 U. S. 651 22
Work v. *Rives*, 267 U. S. 175, 182 18

TABLE OF STATUTES CITED

PAGE

Act to Regulate Commerce (42 Stat. 379) 37
Carriers Taxing Act of 1937 (Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U. S. C. c. 11) 4, 5, 11, 12, 13, 46
Interstate Commerce Act, 49 U. S. C. § 1(18)-(22), 15a, 20a, 20... 11, 19, 29, 34, 35, 37, 43, 44, 45, 46, 48
Locomotive Inspection Act 11, 48
National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151, *et seq.*) 4, 12, 23, 30, 32
Railroad Retirement Act of 1937 (Act of June 24, 1937, c. 812, 49 Stat. 967, 45 U. S. C. c. 9) 4, 5, 11, 12, 13, 14, 32, 46, 49
Railroad Unemployment Insurance Act (Act of June 25, 1938, Public No. 722, 75th Congress, 3rd Session) 4, 5, 11, 12, 13, 46
Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. c. 8, amending the Act of May 20, 1926, c. 347, 44 Stat. 577) 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 21, 23, 29, 30, 31, 32, 33, 34, 35, 39, 40, 42, 44, 45, 46, 48, 49, 50
Social Security Act (Act of August 14, 1935, 49 Stat. 620, 42 U. S. C. c. 7) 4, 12, 13, 32
Transportation Act of 1920 (Act of February 17, 1920, c. 77; 41 Stat. 435, 460) 18, 19
Urgent Deficiencies Act of October 22, 1913 ..... 7, 19

Annual Reports of the Interstate Commerce Commission, 1928 through 1935 (excerpts quoted R. 246-260) 41, 44
Regulations under the Railroad Retirement Act of 1937, dated May 31, 1938 (Federal Register, June 23, 1938, Vol. 3, p. 1478, 1480) 14

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS, individually and as United States Attorney for the District of Utah, and INTERSTATE COMMERCE COMMISSION,

Petitioners,

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

The undersigned, as counsel for Hudson & Manhattan Railroad Company and with the consent of all the parties, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

WM. D. WHITNEY, *amicus curiae,*
as counsel for Hudson & Manhattan Railroad Company.

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS, etc., and INTERSTATE COMMERCE COMMISSION,
Petitioners,

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF WM. D. WHITNEY AS *AMICUS CURIAE*

THIS BRIEF RELATES TO PROCEDURE ONLY

This brief will confine itself to suggestion the grounds for sustaining the procedure followed in the courts below. It will not concern itself with the merits of the question whether the respondent is or is not, within the meaning of the Railway Labor Act, a "street, interurban or suburban electric railway" or is or is not "operating as a part of a general steam railroad system of transportation".[1]

[1]It may be, moreover, that this Court will not review that question, in view of the concurrent findings of fact by the two Courts below, *Cincinnati, etc. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 196, *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 542,—and that "the writ of certiorari was not granted to review the particular facts but to pass upon the question[s] of [procedural] principle", as in *Crowell* v. *Benson*, 285 U. S. 22, 65.

STATUS OF THE HUDSON & MANHATTAN

The Hudson & Manhattan Railroad Company, for which this *amicus curiae* is counsel, is the plaintiff in a suit in equity of similar character against the United States Attorney for the Southern District of New York (noticed in *Shannahan* v. *United States*, Oct. Term 1937, No. 502, footnote 5), in which an injunction has been granted in favor of the Hudson & Manhattan, and on which appeal by the United States Attorney and certain intervenors is pending before the 2d Circuit Court of Appeals. The facts in the Hudson & Manhattan's case are wholly dissimilar to those in the Utah Idaho's. But in respect of procedure, the only distinction between the conduct of the two cases is that the Utah Idaho introduced detailed evidence *de novo* before the District Court (albeit the testimony "was in substance a duplication of the testimony before the Commission", *per* opinion of the 10th Circuit Court of Appeals) (R. 332); whereas the Hudson & Manhattan accepted the report of the Interstate Commerce Commission as a final and correct statement of the facts, and contested its conclusions of law only.[2]

STATEMENT OF THIS CASE

The respondent, and other interurban railroads in a similar position, are unquestionably subject to the provisions

---

[2]The government's petition for certiorari was, therefore, in error in saying that "each of the lower courts passing upon the question has completely ignored the determination by the Interstate Commerce Commission". See opinion of Judge Woolsey in the *Hudson & Manhattan* case (S. D. N. Y.) 22 Fed. Supp. 105.

either of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. c. 8, amending the Act of May 20, 1926, c. 347, 44 Stat. 577) or of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151, *et seq.*). Interstate steam-railroad carriers are subject to the Railway Labor Act, but, in defining the term "carriers" to which it applies, the Act provides

> "That the term 'carrier' shall not include any street, interurban or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power."[3]

The mandatory system of regulation of carriers by the National Mediation Board and the National Railroad Adjustment Board set up under the Railway Labor Act (see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 545) is more closely supervisory and burdensome than the regulation by the National Labor Relations Board set up under the National Labor Relations Act.

The Railway Labor Act provides that the question whether a carrier is within or without the exemption proviso may be referred in the first instance by the National Mediation Board to the Interstate Commerce Commission

---

[3]The presence of identical exclusory definitions in the Railroad Retirement Act of 1937 (Act of June 24, 1937, c. 812, 49 Stat. 967, 45 U. S. C. c. 9), the Carriers Taxing Act of 1937, (Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U. S. C. c. 11) and the Railroad Unemployment Insurance Act (Act of June 25, 1938, Public No. 722, 75th Congress, 3rd Session) present interurban railroads like this respondent with the identical question as between those statutes and the Social Security Act (Act of August 14, 1935, 49 Stat. 620, 42 U. S. C. c. 7).

for determination, and also authorizes such a determination to be made upon complaint of any party interested. § 1, (First). There is no provision in the statute for judicial review of the Commission's determination.[4]

In this case the National Mediation Board referred the question of the status of the respondent to the Interstate Commerce Commission, which held hearings and rendered a determination that the respondent was not within the exclusory proviso (214 I. C. C. 707) (R. 314).

The statute provides cumulative penalties for non-compliance with its terms, at the rate of $1,000 to $20,000 fine or 6 months' imprisonment for the carrier itself, and for each offending officer or agent; *each day of non-compliance constituting a separate offense,* § 2 (Tenth), and makes it

> "the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *."

Presumably, the United States Attorneys will do their duty; and the District Court has found that the United States Attorney for District of Utah, one of the petitioners herein "has threatened to file suits and prosecute the plaintiff [the Utah Idaho] and its officers and agents for the failure upon the part of the plaintiff to comply with the Railway Labor Act" (R. 66).

---

[4] The provisions of the Railroad Retirement Act, the Carriers Taxing Act and the Railroad Unemployment Insurance Act are identical.

After the decision in this case by the Interstate Commerce Commission, the carrier refused to post the notice prescribed by the National Mediation Board pursuant to § 2 (Eighth) of the Act (R. 23, 64) and brought suit in equity against the United States Attorney for the District of Utah praying for an injunction against enforcement of the Act. The Interstate Commerce Commission was granted leave to intervene as a party defendant (R. 39). The District Court, after a trial *de novo*, at which the testimony was substantially the same as that before the Commission, found as a fact and as a conclusion of law that the respondent was an interurban electric railway and that the decision of the Commission was "contrary to law" (R. 67, 68). Accordingly, an injunction was entered against enforcement of the Railway Labor Act against respondent by the United States Attorney (R. 68). The decision of the District Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit, with an opinion by Circuit Judge Lewis, concurring opinion by Circuit Judge Williams and dissenting opinion by Circuit Judge Bratton (R. 327).

The District Court opinion is unreported. The Circuit Court of Appeals opinion is reported at 95 F. [2d] 911.

PROCEDURAL QUESTIONS PRESENTED

At the threshold of any suit in equity against government enforcement officers, and in which there has been a prior report by an administrative body, we recognize that the following procedural questions are presented:

(A) Questions relating to judicial review of administrative decisions generally.

(1) Does the determination made by the Interstate Commerce Commission wholly preclude judicial examination of the same question?

(2) If not, shall the re-examination of the question, or the review of the determination, be upon a trial *de novo*, or upon the record before the administrative body or upon the face of its report?

(3) Or is the determination merely advisory or persuasive?

(B) Questions relating to such review by suit in equity for injunction.

(1) Does equity provide the proper forum?

(2) Is the defendant the proper government officer to sue?

We appreciate the importance and independence of each of these questions, and the perils with which the journey of the plaintiff is fraught, for it is settled that if its attorneys have erroneously advised it as to any of these steps, the consequences are fatal to its suit. An apt example is provided by the fate of the Chicago South Shore and South Bend Railroad, whose trustees (Shannahan, *et al.*) chose in respect of this same statute a different procedure from that determined upon by the Utah Idaho and the Hudson & Manhattan; *Shannahan* v. *United States*, 303 U. S. 596.

The *Shannahan* case is determinative that an interurban railroad may not litigate its status under the Railway Labor Act by invoking the provisions of the Urgent Deficiencies Act of October 22, 1913. It remains to determine whether the course followed by the Utah Idaho and the Hudson & Manhattan is the proper alternative. We believe that it is.

The leading cases in this Court which have laid down the great principles of procedural due process have, of course, largely arisen upon a consideration of constitutional questions, predominantly occasioned by an assertion of rights under the 5th and 14th Amendments or by a contesting of jurisdiction consequent upon the division of powers between state and nation. And on the question whether the courts must make an independent examination of the facts determinative of the constitutional questions, this Court has been sharply divided in opinion. But that question is not involved in this case at all, as we have here, not a contest on constitutional grounds, but a problem of interpretation of Congressional enactment, and one which is presented in a setting that calls peculiarly for independent judicial consideration, for it involves a contest between two statutes in the same field of regulation. The question is simply whether the respondent falls within a defined class which the legislature has subjected to the one statute, or is excluded from that class and therefore is subjected to the other. And the exclusory proviso is expressed in a phrase which was taken from prior statutes which had received, in cases presented by other railroad corporations, judicial construction from this Court, so that the statute here presented must be deemed to have adopted that construction.

SUMMARY OF ARGUMENT

I. The determination of the Interstate Commerce Commission does not conclusively subject the Utah Idaho to the Railway Labor Act; and the Utah Idaho is entitled to at least some form of judicial examination of its status.

II. In the absence of any express statutory provision for review, the question of the status of the Utah Idaho under the Railway Labor Act may properly be examined by the court in a proceeding in equity to enjoin enforcement of that Act against the Utah Idaho.

III. In such a proceeding, the re-examination of the question determined by the Commission—or the "review" of that determination—is, in theory, necessarily based upon a new record. However, it may be appropriate, in the interests of comity and because of the deference due to the part played by the Commission, that the record before the court diverge as little as possible from that before the Commission. This desideratum has been fulfilled in the present case, for the District Court reached its decision both upon the evidence before it and, independently, upon the basis of the record before the Commission (R. 67, 68), and, as was found by the Circuit Court of Appeals, the testimony was substantially the same in both cases.

IV. As there is no statutory provision for judicial review, the true rule would appear to be that the Commission determination is without binding effect upon the courts either on the facts or on the law, but is advisory or persuasive only.

V. (1) However, assuming that the findings of the Commission as to the facts involved are binding upon the courts, unless unsupported by substantial evidence or arbitrary or capricious, the ultimate question whether, upon the facts disclosed, the Utah Idaho is or is not an interurban falling within the specific terms of the proviso demands a

construction of the statute, which is a judicial function. It cannot be assumed that Congress intended by mere implication to transfer such a function to the Commission. This is particularly the case, where the construction of the statutory phrase is necessary to resolve a conflict between two statutes, and thereby to determine a conflict of jurisdiction between administrative bodies or officers.

(2) The intrinsic nature of the determination made by the Commission renders it inappropriate to limit judicial review to a consideration of whether the determination lacked substantial evidentiary support or was capricious or arbitrary. The statutory proviso construed by the Commission does not relate to a matter with regard to which a selection may be made in the exercise of administrative discretion. Nor does the statute confer upon the Commission any authority to make a choice among several equally legitimate and proper alternatives. The question is one of divining the intent of Congress in the use of specific terms previously construed by this Court.

(3) The provision authorizing and directing the Interstate Commerce Commission to make a determination under the Railway Labor Act has as its purpose merely to transfer to the Commission (contingent upon a request for a determination) an authority which it could not have had impliedly (since it is not concerned with the administration of that Act), and which otherwise would have rested exclusively with the administrative bodies or officers charged with the application of the Act. The authority thus conferred is the same as that which every government body impliedly possesses to determine whether or not it shall apply to a particular case the statute under which it

acts. Such a determination has no more than perstuasive force.

(4) Uniformity in the construction of the exemption proviso of the Railway Labor Act and identical provisos in other statutes can be secured by recourse to this Court. Moreover, because determinations of the Commission with respect to the application of identical provisos in the Interstate Commerce Act and the Locomotive Inspection Act are not binding upon the courts, there would result a lack of uniformity in the application of identical provisos, if the determinations of the Commission under the Railway Labor Act, the Railroad Retirement Act, the Carriers Taxing Act and the Railroad Unemployment Insurance Act should be held binding on the courts. The prerogative of the Commission to render inconsistent decisions would likewise militate against uniformity.

ARGUMENT

POINT I

The determination of the Interstate Commerce Commission does not preclude all judicial consideration of the Utah Idaho's status.

The petitioners do not appear seriously to contend that by decree of the Interstate Commerce Commission the Utah Idaho may be conclusively held to fall outside the scope of the exemption proviso. The point is, nevertheless, made by the government (in sub-division B, at pp. 37-38 of its brief), it being contended that, however unreasonable, arbitrary, capricious and devoid of evidentiary support, the Commission's determination must abide, provided only that it was preceded by a hearing.

The hesitation which must necessarily accompany such a suggestion is well warranted, in the first instance, by the eventual extent of its consequences. Moreover, failing as it does to accord any tangible content to the statutory requirement for a hearing, and buttressed only by two inapplicable cases, the suggestion must fail.

(a) Here we are confronted with two pairs of Congressional enactments, each turning upon the same statutory criterion. The alternatives presented are: *First*, whether the Utah Idaho in its relation with its employees is to be subject to the Railway Labor Act, on the one hand, or to the National Labor Relations Act, on the other; and, *second*, whether it and its employees are to be subject to the Railroad Retirement Act, the Carriers Taxing Act and the Railroad Unemployment Insurance Act, on the one hand, or to the Social Security Act, on the other. In neither case does the answer rest upon administrative action, but in both it derives *directly* from the statutory clause:

> *"Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power".

This proviso, phrased in identical terms, is found in paragraph First of section 1 of the Railway Labor Act, and in section 1(a) of the Railroad Retirement Act of 1937, the Carriers Taxing Act of 1937 and the Railroad Unemployment Insurance Act.

Conversely the National Labor Relations Act provides, in section 2(2), that the term "employer" as used therein

"shall not include * * * any person subject to the Railway Labor Act, as amended from time to time."

By virtue of corresponding provisions of the Railroad Retirement Act (§ 17), the Carriers Taxing Act (§ 9a), and the Railroad Unemployment Insurance Act (§ 13a, amending § 907(c) of the Social Security Act), employers subject to those statutes are in effect excluded from the operation of Titles II, VIII and IX, respectively, of the Social Security Act; the Railroad Unemployment Insurance Act, further, relieving such employers from the unemployment compensation acts of the several States (§ 13b-g).[5]

The question that arises in these circumstances is as to what effect Congress intended to give, or as to what effect this Court could recognize that Congress constitutionally included, by the following sentence of the statute (Railway Labor Act § 1, paragraph First):

"The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

The Railroad Retirement Act, § 1(a), the Carriers Taxing Act, § 1(a), and the Railroad Unemployment Insurance Act, § 1(a), all have corresponding provisions, phrased in identical terms with that just quoted from the Railway Labor Act.

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[5] Section 13(b)-(g). See *Steward Machine Co.* v. *Davis*, 301 U. S. 548 and *Carmichael* v. *Southern Coal & Coke Company*, 301 U. S. 495, with regard to the relationship between Title IX of the Social Security Act and the various State unemployment compensation laws.

If is at once apparent that the Congress did not authorize or direct that the Interstate Commerce Commission determine all cases. If the Mediation Board, the Railroad Retirement Board or the Commission of Internal Revenue, as the case may be, should elect to make its or his own determination, and if the railway in question and its employees be content to abide by their determination, the Interstate Commerce Commission would be devoid of power in the premises.

Indeed, the Railroad Retirement Board has adopted a procedure for a determination of the question, under which the Interstate Commerce Commission in many cases will not be entrusted with such power in respect to the Railroad Retirement Act.[6]

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[6]The Regulations under the Railroad Retirement Act of 1937, dated May 31, 1938 (Federal Register, June 23, 1938, Vol. 3, p. 1478, 1480), provide:

"Sec. 2.13. *Electric railways.*—The General Counsel will require the submission of information pertaining to the history and operations of an electric railway with a view to determining whether it is an employer [within the meaning of the statute] and will inquire into and make his recommendations upon the following considerations:

"(a) whether the electric railway is more than a street, suburban or interurban electric railway; or

"(b) whether it is operating as a part of a general steam-railroad system of transportation; or

"(c) whether it is part of the national transportation system.

"If in the opinion of the General Counsel an electric railway has the characteristics set forth in either (a), (b) or (c), he will conclude that it is an employer under the Act and if the operator concurs in such opinion, the decision will be made final by the Board. If the operator does not concur in the conclusion reached the question will be submitted to the Interstate Commerce Commission for determination. (Secs. 1, 10, 50 Stat. 307, 314; 45 U. S. C. Sup. III, 228a, 228j.)"

It seems difficult to contend that a determination of the Commission which may never be invoked, would, when it happens to be invoked, be vested with so unique and extraordinary a sanctity as to shut off resort to the courts. That, on the contrary, the determination of the Commission enjoys only persuasive force, is affirmatively and clearly indicated by certain considerations hereinafter referred to, but exceeding the scope of the present point.

In so far as the immediate question is concerned, aside from the broad domain over which the Interstate Commerce Commission would be set as absolute sovereign, and restricting the discussion to the application of the Railway Labor Act alone, the conception of the Commission's power as absolute is contrary to general principles of law and to the statute itself.

(b) Plausibility forbids the contention that after going through the motions of a "hearing" the Commission has the power beyond recourse to subject a railway to the widespread and complex regulation of the Railway Labor Act and, in consequence, to expand or contract the metes and bounds of the Act as its fancy dictates (subject only to repeal by an Act of Congress). Having such power, the Commission would be clothed in the robes of a court of last resort and would, at the same time be installed as a legislature *pede plano* with Congress. As the sole arbiter of the meaning of the proviso, the Commission would be empowered in effect to amend the Act as it saw fit.

The words of the proviso would be those of Congress, but their content would be, without control, that supplied by the Commission. The terms of the statute circumscribing the scope of its application to certain classes of railroads would be rendered inoperative. Although a standard is pre-

scribed, the absence of any form of adequate judicial review would render such standard meaningless and ineffectual. For Congress to grant this boundless power of determination to the Commission would be to abdicate or to transfer to the Commission the essential legislative functions with which Congress is vested by the Constitution.[7] Moreover, the principle of the separation of powers would also be set at naught in that the Commission would, in the capacity of an independent and uncontrolled judicial body, construe the law and adjudge the status of the railway before it.

But the statute itself precludes any supposition that the Commission may arbitrarily define the relations of carriers with their employees and delimit the bounds of the statute. The provision of the Railway Labor Act which requires a hearing prior to the issuance of a determination by the Commission does not merely direct the Commission to hold a hearing *pro forma* but requires "a hearing in a substantial sense", *cf. Morgan v. United States,* 298 U. S. 468, 481; and, in order to determine whether or not that requirement has been complied with, this Court must at the very least determine whether there was "evidence adequate to support pertinent and necessary findings of fact." *Morgan* v. *United States, supra,* at page 480; *cf. St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51; *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company,* 227 U. S. 88, 91-92.

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[7] *A. L. Schechter Corp.* v. *United States,* 295 U. S. 495, 529. We do not, of course, attempt to imply that the Commission would exercise its functions unwisely or unfairly in construing the proviso; but the assumption to the contrary does not answer the question. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420.

(c) The suggestion of the petitioners here seeks a basis in two cases decided in a field of law distant from the subject-matter of the present controversy.

The inquiry into the validity of the action threatened by the United States Attorney for the District of Utah and, incidentally, of the order of the National Mediation Board —to the consideration of which the petitioners have interposed the determination by the Interstate Commerce Commission—does not involve one of those "matters arising between the Government and others which from their nature do not require judicial determination and yet are susceptible of it". *Ex parte Bakelite Corporation*, 279 U. S. 438, 451. Such matters, as was noted by Mr. Justice Brandeis in his dissenting opinion in *Crowell* v. *Benson*, 285 U. S. 22, 89, are those

> "ordinarily outside of judicial competence,—the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails,—matters which are within the power of Congress to commit to conclusive executive determination".

But it was further pointed out by Mr. Justice Brandeis in the same dissenting opinion (285 U. S. at pp. 87-88, Note 23):

> "That all questions arising in the administration of the Interstate Commerce Act * * * could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed."

The determinations of the Interstate Commerce Commission under the Railway Labor Act are not analogous to those rendered by the Commission under the authority

delegated to it by the Transportation Act of 1920 to determine the amounts of certain payments to be made to carriers who had been under federal control during the World War.[8] *Butte, Anaconda & Pacific Railway Company* v. *United States,* 290 U. S. 127; *Great Northern Railway Company* v. *United States,* 277 U. S. 172. The first of these cases involved section 204 of the Act, providing for the reimbursement to certain carriers of deficits suffered by them during the period of federal control; and the second case involved section 209 of the Act, providing for the payment to certain carriers of amounts necessary to make good the guaranty granted by the Government to those of such carriers who duly filed with the Commission a written statement accepting all the provisions of that section. Both cases, therefore, fall within the category of those in which Congress occupies towards the proposed beneficiaries of bounties, or of compensation for losses suffered from Governmental action, the relationship of a benefactor. *Work* v. *Rives,* 267 U. S. 175, 182. In creating a right in individuals against itself, the United States is, of course, not obliged to provide any remedy in the courts. *United States* v. *Babcock,* 250 U. S. 328; *cf. De Groot* v. *United States,* 5 Wall. 419, 431-433. In any event, it is evident that where a statute grants a payment or confers a bounty in an amount to be determined by a special tribunal, such statute does not provide for a payment in an amount to be determined by the courts. And under sections 204 and 209 the Secretary of the Treasury was authorized to draw in favor of the carrier entitled thereto warrants, not in any amounts specified in the Act, but "for the amount shown in" the certificate of the Interstate Commerce Com-

[8] Act of February 17, 1920, c. 77; 41 Stat. 435, 460.

mission as payable to that carrier,[9] or to make good the Government's guaranty.[10] Had the court assumed jurisdiction to revise the certificates of the Commission, it would indeed have undertaken the function of a disbursing agent. *Cf. Decatur* v. *Paulding*, 14 Pet. (39 U. S.) 495, 516.

In making a determination pursuant to paragraph First of section 1 of the Labor Railway Act, the Commission, it is true, does not exercise a power conferred upon it by the Interstate Commerce Act,[11] and for that reason no review lies under the Urgent Deficiencies Appropriation Act (*Shannahan* v. *United States*, 303 U. S. 596). But in this case the Utah Idaho did not invoke that jurisdiction. It may be observed, however, that the Railway Labor Act was passed by Congress as a measure regulatory of interstate commerce,[12] and the function of the Commission under that Act, while judicial, relates exclusively to such regulation. The Commission here cannot be in any manner likened to the dispenser of a bounty granted by the United States, or to a disbursing agent.

POINT II

Equity provides the appropriate forum for judicial review.

This proposition is not denied, or apparently questioned, by the Government. We find no argument on the part of

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[9]Section 204(g), 41 Stat. 461.

[10]Section 209(g), 41 Stat. 466.

[11]Indeed, it is clear that the present situation is not one in which the Commission exercises its administrative discretion in regulating the operations of railroads.

[12]See *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 553.

the Government that if the question of the Utah Idaho's status is to be considered by the courts at all, the present is not an appropriate form of proceeding in which that may be done. We therefore refer briefly to the question only on the assumption that it may be raised by the Court itself.

The absence of a statutory provision for judicial review necessarily leaves equity as the only "appropriate" forum for determination of the question presented; see dissenting opinion of Mr. Justice Brandeis in *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, 294, 295; and *a fortiori* the opinion of Mr. Justice McReynolds for the majority in the same case.

This is not an effort to enjoin the Interstate Commerce Commission, as it is recognized that the Commission did not enter an enforceable order, and that, as already pointed out, the Commission's action constituted

> "merely preparation for possible action in some proceeding which may be instituted in the future."

Compare *Shannahan* v. *United States*, 303 U. S. 596, 599.

The action against which an injunction is here sought, is the imminent prosecution by the United States Attorney. The District Court made a finding of fact that

> "the defendant has threatened to file suits and prosecute the plaintiff and its officers and agents for the failure upon the part of the plaintiff to comply with the Labor Railway Act, and that unless the relief herein prayed for is granted he will do so" (R. 66).

Indeed, under the statute, it is the plain duty of the United States Attorney to institute, upon the application of a duly delegated representative of a carrier's employees, and to prosecute, all necessary proceedings for the enforcement of

the provisions of § 2 and for the punishment of all violations thereof.

And here action had already been taken by the National Mediation Board, in that it had issued an order requiring carriers subject to the Act to post certain notices prescribed by the Board pursuant to § 2 (Eighth) of the Act (R. 23, 35, 64).

Therefore, unless relief be granted in an action of the present character, the severe penalties imposed by the Railway Labor Act for a failure to comply with its provisions will preclude resort to any court for determination of the Utah Idaho's rights. As pointed out in the Statement of Facts, these penalties run at the rate of a $1,000 to $20,000 fine or six months' imprisonment for the carrier itself and each offending officer or agent, *each day of non-compliance constituting a separate offense*. § 2 (Tenth).

The Utah Idaho alleged, and the District Court found, that it refused to comply with the statute,—specifically, that it had failed to comply with an order of the National Mediation Board requiring carriers subject to the statute to post certain notices pursuant to § 2 (Eighth), (R. 23, 64).

The respondent was thereby placed in this impossible position: That either it must obey the statute even though not properly applicable to it, or it must incur the risk of suffering the severe penalties for a violation of the order provided in paragraph Tenth of Section 2.

Yet the facts of this case present a serious question of statutory interpretation and application; if this were otherwise doubtful, it would be established by the concurrent findings of both Courts below in favor of the Utah Idaho on the merits. But under the statutory scheme, resort to the courts for a determination of this question is effectively shut off by the imposition of the heavy and cumulative pen-

alties without the opportunity for judicial review. Accordingly, the principles of *Ex parte Young*, 209 U. S. 123, apply; see also *Helvering* v. *Carter*, reported with *Carter* v. *Carter Coal Company*, 298 U. S. 238, particularly the opinion of Mr. Justice Cardozo at page 341. Indeed, failure promptly to resort to equity would impose upon the railroad the risk of having been held to have waived its rights; *Wadley Southern Railway Company* v. *Georgia*, 235 U. S. 651.

Whether the penalty be denominated a tax and be made collectible by the Commissioner of Internal Revenue (as in *Helvering* v. *Carter*, *supra*, 298 U. S. 238), or be recognized frankly as a penalty and be made collectible upon prosecution by the United States Attorney (as here, and as in *Ex parte Young*, *supra*, 209 U. S. 123), is immaterial. In either event, the appropriate relief is by suit in equity against the enforcement officer. There is no ground for suit against the Commission itself or the National Mediation Board, as they lack prosecuting or collecting functions; *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

Reference might be made to *Petroleum Exploration, Inc.* v. *Public Service Commission of Kentucky*, 304 U. S. 209; but that decision is not applicable here, and on several grounds. The penalty in that case was light and noncumulative, and the sole effect of obedience was to subject the corporation to the duty of appearing and giving testimony in litigation; whereas, here the respondent has, in harmony with the decision of the *Petroleum Exploration* case, accepted the obligation to appear and litigate before the Interstate Commerce Commission, without prior resort to the courts.

Obedience to the statute would impose a substantial burden upon the railroad, for not merely would it determine status, but it would subject the road to the burdens of the Railway Labor Act, which are more direct, closely supervisory and burdensome than those imposed by the National Labor Relations Act.

Application of the Railway Labor Act to the Utah Idaho would group it with the great body of steam carriers, at least so far as concerns its labor relations. The point is obviously important, as it was entirely open to the Congress to recognize (as it did) a vital distinction between localized interurban lines and the general national steam railroad system of transportation, at least so far as the media for regulation of labor relations were concerned. Such considerations are brought into clear relief by the provision, peculiar to the Railway Labor Act, of a so-called National Railroad Adjustment Board to "consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope * * *", § 3 (First) (a). The Congress obviously had a reasonable basis for determination that localized interurbans and their employees might not find adequate and appropriate representation on a board thus to be dominated by the major carriers and the organizations, "national in scope", of their employees. And equally reasonably, the Congress may have desired to discourage the extension to local suburban railways of any nation-wide strike, lockout, or other labor trouble, that might develop on the lines of the general steam railroad system of transportation.

POINT III

The nature of the record upon which the court of equity shall determine the question.

This question does not arise at all in the *Hudson & Manhattan* case, as the only record before the court in that case was the *report* of the Commission itself. In other words, the Hudson & Manhattan accepted as conclusive the factual description of the Railway Company contained in the report, and took the position (accepted by the District Court, 22 Fed. Supp. 105) that the Commission committed error of law on the face of the report.

But we do not understand from the Government's brief that it seriously argues that the present case should be reversed merely because there was a trial *de novo* below on a new record. With this view we agree.

Theoretically, in the absence of statutory provision for judicial review, there must necessarily be a new record of some sort before the court. Nor would there be reasons, in the absence of express statutory provision, for the adoption of a rule that no evidence will be permitted other than the actual record before the Commission. See *United States v. Idaho*, 298 U. S. 105, 109:

> "Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony."

The problem is not as to the *form* of the record, but as to the degree of weight to be accorded by the courts to the Commission's determination. Comity of one branch of the government toward the other, and specifically the deference owing to a determination by the Interstate Commerce Commission, may render it at times desirable that the courts

should confine their examination of the question to matters presented at the hearings before the Commission; but as the suit is plenary in form, there is no room for a *rule* that the court record shall be so confined. And indeed, such a rule would work serious injustice in a case in which the Interstate Commerce Commission may have erroneously excluded relevant evidence, for as the proceeding is not one for statutory review, the courts lack any power to send the case back to the Commission for further investigation and findings of fact.

The courts below in the present case did not *in substance* go beyond the record before the Commission. The District Court, in its second conclusion of law (R. 67), expressly held that the evidence introduced at the hearing before the Commission showed that the Utah Idaho falls within the terms of the exemption proviso and that, in arriving at the opposite conclusion, the determination of the Commission "is contrary to and is against the law" (R. 68). And the Circuit Court of Appeals found that the testimony before the District Court "was in substance a duplication of the testimony before the Commission" (R. 332). Hence the present case has been decided upon the record before the Commission, as well as upon the evidence before the District Court; and, further, the decision was, *in effect,* confined to the facts subjected to the scrutiny of the Commission.

POINT IV

The Commission's determination, however persuasive, is without any binding force in the courts.

For the reasons mentioned in POINT III, *supra,* neither the Hudson & Manhattan nor the Utah Idaho really needs to advance this contention. As to the Utah

Idaho, the decisions below rested upon substantially the same record that was made before the Commission, and the District Court (whose decree was affirmed in full by the Circuit Court of Appeals) expressly found that the Commission erred. As to the Hudson & Manhattan, the question does not arise at all, because the Commission's statement of operative facts upon the face of its report was in that case accepted as correct.

However, it appears to us to be irrefutable, at least in logic, that the Commission determination, however persuasive, is without any binding force in the Courts. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, where there had been a prior Commission determination involving precisely the same type of question under a prior statute containing the same definition with which we are here concerned, this Court did not hold that the Commission determination was entitled to binding force in any respect.

For the same reason that a railway in the position of this respondent is prevented from seeking a review of the Commission's determination (*Shannahan* v. *United States*, 303 U. S. 596), it appears to follow that the Commission's determination should be without binding force in any respect in a judicial proceeding. There is a certain inequality apparent in the conception that a citizen may not directly review a determination adverse to him by one of the branches of the executive department, and yet may be confronted by that determination in another proceeding. And not merely confronted, but advised that that determination is actually binding upon him (although he could not review it), or at least is binding upon him unless plainly arbitrary.

It seems logically to follow from the decision of this Court in the *Shannahan* case that the Commission's determination is without any more than persuasive force in a case such as the present. The ground of the *Shannahan* decision was evidently that the Commission's determination was not an order, could not be enforced, and was merely preparatory to other action. In other words, the holding was that the Commission's determination had no direct incidence upon the respondent. But if the Commission's determination was without effect upon the respondent, would it not appear to follow that respondent should be immune from having, in a different proceeding, an effect attributed to that decision?

We turn now to an assumption *arguendo* that some weight is to be accorded to the Commission's determination, in other words to an assumption that this case is to be treated in the same way *as if* it were a judicial review of Commission action, and on that assumption to consider the question of the weight to be accorded by the courts to the Commission's determination.

POINT V

In any event, the meaning of the exemption proviso of the Railway Labor Act presents a question for decision by the Court.

Assuming that we were right in POINT I, and the Government wrong in its argument in Subdivision B of its brief at pages 37-38, that is to say, assuming that this statute does not have the effect of completely ousting the courts of jurisdiction, and further assuming that we were wrong in our argument in POINT IV that the determination

by the Commission under the statute is without any binding force in the courts, there remain for delimitation the respective functions of the Commission and of the courts. To what extent is the Commission's determination binding?

The important problem presented in this class of cases appears to us to be as to where to place the boundary line between facts and law. The bulk of the argument in the Government's brief is to the effect that the Commission's determination is binding unless arbitrary, capricious or not based upon substantial evidence; and on this principle we do not find ourselves in disagreement with the Government, so long as it is confined to determinations of fact and not of law. The heading of the Government's point ("A" at p. 18) is expressed more broadly; but throughout the argument which follows (pp. 18-37), we find no authority, or indeed serious argument, to the effect that the rule applies to determinations by the Commission other than determinations of fact. For example, the Government quotes from the opinion of Mr. Justice Brandeis to this Court in the *Shannahan* case, 303 U. S. 596, 599, to the effect that

> "The function of the Commission is limited to the determination of a fact".

The Government draws from this the inference that this Court intended to adopt a rule that the interpretation of the statutory phrase was itself a determination of fact. We do not understand that the Court intended to overthrow the fundamental principle of the division of function between administrative bodies and the courts, or to withdraw from the courts the ultimate responsibility for the interpretation and application of statutory phrases. The quoted statement in Mr. Justice Brandeis's opinion was merely introductory to the decision that the Commission does not, under

this statutory scheme, enter a "reviewable order". In thus drawing the distinction between the preliminary determination of fact by the Commission and the entry of an order, Mr. Justice Brandeis could not have intended to imply that all of the reports and opinions of the Commission necessarily constitute determinations of fact only, as distinct from determinations of law, with the effect of shutting up resort to the courts otherwise than in accordance with the rules established for judicial review of findings of fact. The confusion, if confusion there be, arises out of the many meanings of which the word "fact" is susceptible.

(1) The Construction of the Proviso in Paragraph First of Section 1 of the Railway Labor Act Presents a Question of Law for the Independent Judgment of the Courts.

Whether or not the Utah Idaho falls within the proviso in Paragraph First of § 1 of the Railway Labor Act is a question of statutory construction, and, therefore, a question of law.[13] Indeed, substantially the same question as that here presented has been referred to by this Court as one of law. In *United States* v. *Chicago North Shore & Milwaukee Railroad Company,* 288 U. S. 1, the question was whether the railroad fell within the exemption proviso of Section 20a of the Interstate Commerce Act which is identical in substance with the exemption proviso of the

[13] *Texas & Pacific Railway Company* v. *Interstate Commerce Commission,* 162 U. S. 197, 210; *Illinois Central Railroad Company* v. *Interstate Commerce Commission,* 206 U. S. 441, 457; *Lehigh Valley Railroad Company* v. *United States,* 243 U. S. 412, 414; *Great Northern Railway Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 290, 292; *cf. Ann Arbor Railroad Company* v. *United States,* 281 U. S. 658, 666. Compare also the statement of this Court in *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 109.

Railway Labor Act. This Court evidently approved the action of the District Court, by which that court,

> "after making detailed and elaborate findings of fact, concluded as matter of law that the railroad was an independently operated electric interurban railway expressly excepted from the requirements of the section" (288 U. S., at p. 6).

The courts below were not precluded from examining that question by reason of the preliminary determination of the Interstate Commerce Commission, for it is the function and duty of the courts to make the ultimate determination of any question of law involved in proceedings before the Commission.[14] The necessity of a judicial determination of the particular question of law here presented is emphasized by the fact that the statutory provision to be construed is not of a minor or incidental nature, but involves the applicability to the Utah Idaho of the Railway Labor Act in its entirety. Upon the meaning of the words in the statute hinges the question whether, in its relation with its employees, the Utah Idaho shall be subjected to what may be termed the common or general law of the National Labor Relations Act or to the special and more rigorous regime provided for by the Railway Labor Act.

The proposition that the construction of the terms of a statute is a matter of law is, indeed, only the most evident instance of the broad principle that

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[14] *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Tap Line Cases*, 234 U. S. 1; *Florida East Coast Line* v. *United States*, 234 U. S. 167, 185; *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, 236; *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, 256-257. Compare the statement of this Court in *United States* v. *Dickson*, 15 Pet. 141, 162.

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." (*Great Northern Railway Company* v. *Merchants Elevator Company, supra*, 259 U. S. at p. 291).[15]

It is almost supererogatory to add that to construe the statutory provision and apply it to specific facts is a function—indeed, the essential function—of the judiciary.

In *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, there was presented a close parallel to the present situation. That case involved the question whether a proposed trackage constituted an extension subject to the jurisdiction of the Interstate Commerce Commission under paragraphs (18) to (21) of section 1 of the Interstate Commerce Act, or whether it was excepted therefrom by paragraph (22) of that section, as an "industrial track".[16] The question was held to be one of law and open to decision by the court, notwithstanding the fact that the Commission itself was en-

[15]The power reserved to the Commission to determine whether or not technical words in a tariff were used in a peculiar sense (*cf. Texas & Pacific Railway Company* v. *American Tie & Timber Co., Ltd.*, 234 U. S. 138) does not present a question of construction, as was pointed out in the *Great Northern* case, *supra* (259 U. S. at p. 292). In the present case there is a pure question of statutory construction—of construction moreover of terms previously defined by decisions of this Court (see further argument hereinafter). Compare *Standard Oil Company (Indiana)* v. *United States*, 283 U. S. 235, 238, referring to the construction of words in a tariff as "a simple question of law".

[16]Paragraph (22) likewise withdraws interurban and similar electric railways from the Commission's authority, for the purpose of paragraphs (18) to (21) of Section 1, in terms substantially identical with those used in the proviso of paragraph First of Section 1 of the Railway Labor Act.

titled to determine it incidentally, in considering an application for a certificate of public convenience to construct such trackage. Compare *Smyth* v. *Asphalt Belt Railway Co.*, 267 U. S. 326, 328-9; *United States* v. *Idaho*, 298 U. S. 105, 109.[17]

The Commission's determination in the present type of case has certain characteristics which have been recognized as peculiarly within judicial cognizance. Thus, as already pointed out, the ultimate determination of the status of the respondent railway company resolves a conflict between two groups of statutes,—the National Labor Relations Act versus the Railway Labor Act, and the Social Security Act and the several State unemployment compensation laws versus the Railroad Retirement and allied Acts.[18]

Moreover, the case presents a challenge to the jurisdiction of the National Mediation Board and of the United States Attorney. *United States* v. *Idaho*, 298 U. S. 105, 110. Here the question whether the respondent railway is an interurban, and whether it is part of a general steam railroad system of transportation, "is a mixed question of fact and law" necessarily left for final decision by the courts. An erroneous determination by the Commission

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[17]The fact that paragraph First of Section 1 of the Railway Labor Act gives to the Commission an initial authority of incidental determination of jurisdiction which, in the absence of that provision, could have been exercised only by the National Mediation Board, does not alter the character of such determination and cannot be interpreted as transferring judicial powers from the courts to the Commission. See further argument *infra*.

[18]*Cf. Marbury* v. *Madison*, 1 Cranch. 137, 178: "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

would result in action by the National Mediation Board "in excess of its jurisdiction" (*United States* v. *Idaho*, at p. 109), and then in action by the United States Attorney in excess of his jurisdiction. Such a decision could not be regarded as a mere error of fact. It cannot be assumed that the statute by its mere silence transferred the function of making that decision from the courts to the Commission.

(2) The Function of the Interstate Commerce Commission in Making a Determination of Status Under the Railway Labor Act is Not an Exercise of Regulatory Power or Administrative Discretion; and the Rules Relating to Judicial Review of Regulatory Action and Administrative Discretion Are Inappropriate in the Present Situation.

The nature of the question determined by the Interstate Commerce Commission in the present case differs inherently from that of the questions involved in the cases holding that findings of the Commission therein considered were reviewable only if they lacked the support of substantial evidence. And the nature of the authority conferred upon the Commission by the Railway Labor Act is essentially different from the authority exercised by the Commission in those cases.

In the Railway Labor Act, Congress has, in definite and mandatory terms, excluded a specific category of railways from the scope of that Act. The exclusion is not a privilege granted by Congress to certain railways. Nor is it a privilege which any administrative body has been given the power to dispense. The so-called "exemption" proviso specifically circumscribes the Railway Labor Act's field of operation. A railway which falls within the proviso is *excluded* from the Act. It could not, assuming that it wished to do so, subject itself thereto by merely refraining from seekng an exemption.

The exemption proviso was phrased in terms substantially identical with those clauses which had already been construed by this Court under Section 1(22) of the Interstate Commerce Act (*Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U. S. 299) and under section 20a of that Act (*United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1). The phrase "street, suburban or interurban electric railway" was not a novel one, but in one or more of its parts, had been for many years the subject of judicial interpretation.[19] The proviso is couched in plain language, without technical significance.

The import of the proviso is not controlled by words of degree or measure opening a field of interpretation within which administrative discretion necessarily would play. Its application presents the clear-cut question whether or not the words apply to a given class or set of circumstances. The question is qualitative and not quantitative.

Nor does the Railway Labor Act endow the Interstate Commerce Commission with authority to exercise administrative discretion. No power exists in the Commission to extend the application of the Act to a situation to which it deems the Act appropriate or to restrict the Act when, in the opinion of the Commission, questions of policy or expediency make it desirable to do so. The Commission has no power to grant or deny an exemption under the Act.

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[19] *Cf. Omaha & Council Bluffs Street Railway* v. *Interstate Commerce Commission*, 230 U. S. 324, holding that passenger street railways were not railways within the meaning of the Interstate Commerce Act.

No action on the part of the Commission is necessary to bring any right under the Act into existence.[29]

Thus, the question presented under the exemption proviso, and the authority conferred upon the Commission with regard to that question, differ entirely from the questions and authority involved in cases of reasonable rates, unjust discrimination or undue preferences, where the findings of the Commission are findings of fact and are binding upon the court, if supported by substantial evidence, or where preliminary resort must be had to the Commission prior to a judicial proceeding.

The function of the Commission under the Railway Labor Act is, of course, a judicial and not a legislative one,

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[29]It is in essence not in the nature of an "administrative question" as that term was used, for example, in *Northern Pacific Railway Company* v. *Solum*, 247 U. S. 477, 483. See *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, 273. A contrast with the present situation is found in the *Chicago Junction Case*, 264 U. S. 258, 264. Section 5(2) of the Interstate Commerce Act, involved in that case, provided that the Commission should make an order allowing the acquisition of control by one carrier over another "whenever the Commission is of opinion, after hearing" that this would be "in the public interest". The distinctive characteristics of that provision are that: (a) the term "public interest" inherently carries with it questions of expediency, propriety and desirability; (b) the word "opinion" implies the necessity of exercising discretion and choice; and (c) the condition of the right of a carrier to acquire control over another is not the existence of public interest but the opinion of the Interstate Commerce Commission with regard thereto. In this, and the other instances referred to hereinafter, the quasi-judicial power exercised by the Commission is inextricably intermingled with and subordinated to its legislative powers. Compare *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, decided under the Meat Inspection Act, Act of June 30, 1906, c. 3913, 34 Stat. 669, 676, 678.

for it involves merely a question of statutory construction upon the basis of existing facts and does not, directly or indirectly, involve the adoption of rules or regulations for the future. But, aside from the characterization of the Commission's function as *quasi-judicial*, the underlying nature of the matters involved precludes the restriction of judicial review to the confines appropriate where propriety in the exercise of discretionary power is in issue:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those

presented when the construction of any other document is in dispute." (*Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285, 291 (1922).) [Underscoring ours.]

Where the question is one of rates or practices, a broad field of action is implicitly and necessarily given to the Commission within the bounds of which it may choose between various alternatives.[21] Any one of a large number of rates may be reasonable, even if only one may be the best. Various types and degrees of discrimination may exist without it being possible to say as a matter of law whether or not they are unjust. Within limits set far apart, a judgment as to whether a preference is undue must necessarily rest in opinion, and be based upon a selection, informed by experience.[22] As was pointed out by Mr. Justice

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[21]This characteristic is particularly striking where the action of the Interstate Commerce Commission under review involves the structure of a rate schedule, as in *Mississippi Valley Barge Company* v. *United States*, 292 U. S. 282, or an order of state-wide operation, governing a vast multitude of rates, as in *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, or, again, where the decision of the Interstate Commerce Commission is based in large part upon prognostication of its future effects. Compare *Florida* v. *United States*, 292 U. S. 1. As to other cases of rate fixing, under statutes other than the Interstate Commerce Act, see *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 51; *Acker* v. *United States*, 298 U. S. 426; *Morgan* v. *United States*, 298 U. S. 468.

[22]See, for example, *Seaboard Air Line Railway Company* v. *United States*, 254 U. S. 57. There the question was whether the Commission was correct in regarding a service rendered by certain carriers as "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" (underscoring ours), within the meaning of section 2 of the Act to Regulate Commerce (42 Stat. 379).

Brandeis in *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, 481-482:

> "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887; c. 104, 24 Stat. 379, 380) renders unlawful any *'undue or unreasonable'* preference or advantage, prejudice or disadvantage. In the same section the requirement of 'all reasonable, proper, and equal facilities for the interchange of traffic' is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another. And in the first paragraph of amended § 15 (36 Stat. 551) it is rates, regulations, or practices that in the opinion of the Commission are *'unjustly* discriminatory, or *unduly* preferential or prejudicial,' etc., to which the prohibition is to be applied."

The very nature of the adjectives grants to the Commission a power of choice to be exercised within certain limits. It requires a consideration of various factors of desirability and propriety.

> "* * * * where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for

damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited." (*Mitchell Coal and Coke Company* v. *Pennsylvania Company*, 230 U. S. 247, 257.)[22]

But, in the present case, once the facts bearing upon the status of an electric railway have been ascertained and collated, there remains only a question of law, whether the terms of the exemption proviso were intended by Congress to apply to that situation. True, there may be doubt and difference of opinion, but there is only one correct solution. The mistake, if there is one, is a mistake of law. The bournes of discretion existing in other cases here resolve themselves into one line. The proviso does not provide for the exemption of "reasonably" interurban electric railways.

The question here being one of determining the intent of a specific statutory proviso, the limitation of judicial review would distort the clear purport of the Act, for it would render exemption dependent upon affirmative action of the Commission rather than upon the operation of the law itself.

Conceivably, the Congress might have provided that all railroads should be subject to the Act excepting only those which, in the opinion of the Commission, were so divorced

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[22]Compare *Interstate Commerce Commission* v. *Alabama Midland Railway Company*, 168 U. S. 144, 170; *Seaboard Air Line Railway Company* v. *U. S.*, 254 U. S. 57, 62.

from the general system of steam-railroad transportation that their operations do not affect the functioning thereof."[24] Under that provision, it would also have been necessary as a practical matter to make exemption dependent upon action by the Commission.[25]

It would be supererogatory to mention the innumerable provisions upon which Congress could have modeled a provision conferring discretionary administrative powers to the Commission under the Railway Labor Act. Indeed it would have been superfluous to seek analogies in the statute books. The Interstate Commerce Commission in its Annual Reports to Congress had formulated proposed amendments to the Interstate Commerce Act, which, if adopted, would have granted to the Commission powers, in connection with the exemption provisos of sections 1 (22), 15a and 20a of that Act,[26] similar to those which it now seeks to arrogate to itself under a provision of the Railway Labor Act which differs so obviously from those proposed amendments that it is almost an express negation of the discretionary powers previously sought by the Commission.

The reports of the Commission made in the years 1928, 1929, 1930, 1931 and 1932 recommended:

> "That the present exemption provisions of paragraph (22) of Section 1, Paragraph (1) of section 15a, and paragraph (1), of section 20a, applica-

[24]Compare the *Chicago Junction Case, supra*, 264 U. S. 258.

[25]See, for example, *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464.

[26]As has been noted, sections 1 (22) and 20a set forth exemption provisos substantially identical with that of the Railway Labor Act. Section 15a (the so-called recapture provision, repealed in 1933) was somewhat broader in scope.

ble to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways, and participate in through interstate freight rates with such carriers; provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned." [Underscoring ours.][27]

The Congress did not avail itself of the opportunity to ut in these or any comparable terms discretionary power he Commission under the Railway Labor Act. On the rary, the Commission has been given no authority to umscribe the operation of the proviso, "the law, and the discretion of the commission, determining the rights he parties."[28]

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[27] 42nd annual report of the Interstate Commerce Commission dated December 1, 1928, p. 83 (R. 252). Identical mmendations were made in the 43rd annual report dated ember 30, 1929, p. 89 (R. 252); the 44th annual report d December 1, 1930, p. 69 (R. 255); the 45th annual rt dated December 1, 1931, p. 122 (R. 256); and the 46th ual report dated December 1, 1932, p. 102 (R. 256). No mmendations with respect to further legislation were le in the 47th and 48th annual reports (R. 257, 258); but same recommendation (applying only to sections 1(22) 20a) again appears in the 49th annual report, dated ember 1, 1935, pp. 97-98 (R. 260). As has been noted, ion 15a was repealed prior to 1935. The significance of e recommendations by the Interstate Commerce Commis- is further considered hereinafter.

[28] *East Tennessee, Virginia and Georgia Railway Co.* v. *erstate Commerce Commission*, 181 U. S. 1, 12.

(3) The Determination of the Interstate Commerce Commission Is Merely the Equivalent of One Which Any Government Body Impliedly Possesses to Decide upon the Applicability of a Statute Administered by It.

In assuming, as we have done, that the action of the Interstate Commerce Commission, in making a determination under the Railway Labor Act, restricts to any extent the function of the courts to construe the exemption proviso, we have provisionally acceded to a complete misconception of the purpose and effect of the provision permitting such a determination to be made, namely: to the view that the Commission has been entrusted with a function formerly vested in the courts and, in addition, with a discretionary power to apply a statute which it does not administer.

The stature of the provision in question is, however, far more modest. It provides an expert advisory body to which application may be made for assistance in ascertaining the meaning of the exemption proviso. But neither the Board nor any one else is required to resort to the Commission. The Commission itself cannot act upon its own motion in the matter. Even when its services are invoked, it is devoid of authority to grant or deny any form of relief. The exemption of an electric railway is made to depend not upon any action of the Commission but upon the terms of the statute.

In the absence of any express provision in the law, the National Mediation Board would have been faced with the necessity of construing the exemption proviso without the effective assistance of the Interstate Commerce Commission. The authority to make the initial determination of status would, in that event, have been vested in the Board

by implication—and that authority would have been the same in nature and effect as the power which the Commission itself possesses and exercises in the administration of those sections of the Interstate Commerce Act and the Locomotive Inspection Act which set forth substantially identical exemption provisos.[29] To permit reference of the question of status to the Interstate Commerce Commission—to transfer this implied power of incidental, initial, determination to the Commission—an express provision was, of course, necessary. And the language of the provision actually set forth in the Act is precisely adapted to effectuating that purpose without conferring upon the Commission any power in addition to the implied authority which an administrative body always exercises in applying to specific situations the statute under which it acts.[30] The Commission may be called upon to aid in the interpretation of definite statutory terms, but has no discretionary authority to accommodate those terms in accordance with its views as to the propriety or desirability of applying the Act in a particular instance.

In these circumstances, the attempt to invoke *the absence of any express provision for review* for the pur-

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[29] *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1; *cf. Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, 272; *United States* v. *Idaho*, 298 U. S. 105.

[30] Indeed, the provision in question does not even deprive the National Mediation Board entirely of its power to make initial determinations, but only provides for the *eventual* exercise of that power by the Commission. Nor does the provision expressly require the Board to abide by the determination of the Commission.

pose of clothing the Commission with an authority greater than that which it exercises in construing similar provisos under the Interstate Commerce Act, is to erect a monumental conclusion upon a fragile pedestal. The attempt rests upon the assumption that by mere silence the Congress intended to transfer to the Commission powers previously reserved to the courts and that an established principle was by implication repealed.

Indeed, when considered in the light of certain extrinsic circumstances (to some of which passing reference has already been made), this innate weakness is further aggravated.

From 1928 through 1932, and again in 1935, the Commission besought Congress in its annual reports to grant to it, for the purposes of the Interstate Commerce Act, the very power which the Commission now claims to have received from the silence of the Railway Labor Act. Despite the earnest endeavors of the Commission, the Congress never amended Sections 1 (22), 15a or 20a of the Interstate Commerce Act in the manner desired by the Commission.

And, as has been noted, neither the Railway Labor Act, nor any of the other acts similarly referring identical exemption provisos to the Interstate Commerce Commission, provides for the exercise of administrative discretion by the Commission, or makes the operation of the exemption proviso dependent upon the opinion or any action of the Commission.

And yet, under the view proposed by the petitioners, the Commission would enjoy greater discretionary powers in delimiting the scope of statutes with the administration of which it has no direct concern, than it has in determining

the extent of application of sections 1 (22) and 20a of the Interstate Commerce Act and section 1 of the Locomotive Inspection Act, the administration of which is entrusted to the Commission itself. In no instance in which the power of initial determination rests impliedly with the Commission has Congress seen fit to augment that power by attempting to diminish the province of the judiciary.

In the resulting scheme of things, the Commission would have the greatest powers of discretion in those very instances in which the exercise of discretion by it would be the least appropriate. For, if it was intended that the exemption proviso should be rendered flexible by the injection of considerations of policy, then those questions of policy would more properly have been left to the administrative bodies or officials under whose guidance the Railway Labor Act and other acts similar thereto in this respect are enforced. Questions of policy would frequently be affected by the purposes of the particular statute.

The power of determination which the Railway Labor Acts transfers to the Interstate Commerce Commission thus appears as the equivalent of the authority which the National Mediation Board alone would implicitly have, were permission not given to consult the Interstate Commerce Commission in this matter. It is, indeed, much the same determination which the United States Attorney would necessarily make before bringing suit to enforce the penalties under section 2 of the Act.

The courts are not divested of any part of their power, relieved of any part of their duty, to construe the statute in the light of all the evidence available, merely because the body or official administering the statute has seen fit to attempt its enforcement in a particular case. Neither the

issuance of an order nor the bringing of suit can preclude a judicial determination of the validity of the order or the merits of the suit.

(4) Judicial Review of the Determinations of the Interstate Commerce Commission Tends to Insure Uniformity of Construction.

The contention that a determination by the Interstate Commerce Commission under the Railway Labor Act must be final and conclusive upon the courts in order to assure uniformity of that proviso and similar provisos in other acts[21] assumes three fallacies; namely, (a) that only the Interstate Commerce Commision can divine the meaning of the words used by Congress and sound the hidden depths of the proviso; (b) that the decisions of this Court independently interpreting sections 1 (22) and 20a of the Interstate Commerce Act no longer determine the extent of judicial review in cases involving those sections;[22] and (c) that the Commission will not avail itself of its prerogative of rendering inconsistent decisions.[23]

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[21] Interstate Commerce Act, sections 1(22), 20a and 26; Locomotive Inspection Act, section 1, 43 Stat. 659, U. S. C., Title 45, section 22; Railroad Retirement Act of 1937, section 1, 49 Stat. 967, U. S. C., Title 45, section 228a; Carriers Taxing Act of 1937, section 1, 50 Stat. 435; Railroad Unemployment Insurance Act, Public No. 722, approved June 25, 1938, 75th Congress, 3d Session.

[22] *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1. Compare *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266; *United States* v. *Idaho*, 298 U. S. 105.

[23] *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Virginian Railway Company* v. *United States*, 272 U. S. 658, 663.

This Court in *Great Northern Railway Company* v. *Merchants Elevator Company, supra,* 259 U. S. 285, has already answered the argument that judicial review is destructive of uniformity. In that case it was contended that, in the interests of uniformity, preliminary resort must be had to the Commission in a disputed question of construction of a tariff. Rejecting that contention, this Court said:

> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." (259 U. S. at pp. 290-291.) (Underscoring ours.)

The question whether a railroad falls within the terms of the exemption proviso is not so obscured by innumerable technical details that the courts are helpless to construe the meaning of the law. This Court has already construed identical provisos in *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission,* 286 U. S. 299 and *United States* v. *Chicago North Shore & Milwaukee Railroad Company,* 288 U. S. 1.

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[11]Indeed, the Commission itself recognized the authority of this Court by following its decision in the latter case, in

The limitation of judicial review in the case of determinations made by the Commission under the Railway Labor Act would in some cases result in the imposition of a dual status upon certain railways, since the determination of the Commission under the Railway Labor Act could be ignored only if it were unreasonable, arbitrary or capricious and since, on the other hand, similar determinations by the Commission under sections 1 (22), 20a and 26 of the Interstate Commerce Act and under section 1 of the Locomotive Inspection Act would remain open to full judicial review."

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holding that the Chicago North Shore & Milwaukee Railroad falls within the exemption proviso of the Railway Labor Act, notwithstanding the Commission's previous determination to the contrary under section 20a of the Interstate Commerce Act. *United States* v. *Chicago North Shore & Milwaukee Railway Company*, 219 I. C. C. 135.

[55] *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1; *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266 and *United States* v. *Idaho*, 298 U. S. 105.

If, for example, this Court should now hold that the determination of the Commission with respect to the status of the respondent under the Railway Labor Act is binding upon it in the absence of unreasonableness, arbitrariness or capriciousness, and that the action of the Commission in making such determination was, although erroneous, not open to attack upon those grounds, the respondent would be excluded from the exemption proviso of the Railway Labor Act. But, if hereafter the respondent should construct an extension without securing a certificate of public convenience pursuant to section 1(19) of the Interstate Commerce Act, and a proceeding should be brought by the Interstate Commerce Commission to enjoin such construction, pursuant to paragraph (22) of that Act, this Court might find that the initial determination of the Interstate Commerce Commission under section 1(22) was erroneous, and, accordingly, hold the Utah-Idaho exempt.

And within this very group of statutes the National Mediation Board may invoke the determination of the Commission while the Railroad Retirement Board reaches its own contrary determination; or *vice versa*.[22]

Moreover, under the doctrine that the Commission is not required to be consistent in its decisions, an electric railway could not rely upon a doctrine of *stare decisis* for any assurance that it would be placed in the same category under each of the acts in which the construction of the exemption proviso may be referred to the Interstate Commerce Commission. Nor would it be possible to prognosticate with any degree of certainty, from an examination of previous cases decided by the Commission, whether or not a particular electric line of railway falls within the exemption proviso.

The application of that doctrine to the present situation would obviously lead to havoc in the administration of the Railway Labor Act; and the carefully defined category described in the exemption proviso would become fluid and elusive. A single statutory clause would have many shift-

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[22]That this idea is not far-fetched is indicated by the experience of the Hudson & Manhattan which, after suing for an injunction against enforcement of the Railroad Retirement Act, was met by an answer filed on behalf of the Railroad Retirement Board in which that Board pleaded that proceedings under the Railway Labor Act were without relation to the Railroad Retirement Act, that the Board was not a party to the Railway Labor Act proceedings, that the Board is without any official function or duty requiring it to take cognizance of said proceedings, etc. (*Hudson & Manhattan Railroad Company* v. *Latimer et al.*, Dist. of Col., Equity No. 65706.)

ing meanings."[27] While economic conditions and multifarious factors, by their constant flux, may continually alter the reasonableness of rates and practices, a change of sufficient extent and importance to alter the status of an electric railway under the exemption proviso of the Railway Labor Act (or of similar provisos in other statutes) is hardly one that will occur at frequent intervals.

But the government suggests that the effect of our argument is to render the Commission's determination nugatory. We cannot accept this counsel of despair. Even if there be a trial *de novo* upon evidence in addition to that submitted to the Commission, the function of the Commission remains an important one. For one thing, the party relying upon the Commission's determination will be entitled to introduce the report in evidence; and there will be indeed few courts that will fail to give due respect to that report.[28] Moreover, many instances will arise in which the determination of the Commission will convince all the parties concerned. This corresponds to the usual situation

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[27]The argument that it would be more expedient, because more rapidly conclusive of the status of electric railways, to clothe the Commission with power of final determination thus falls to the ground, for if no set criterion is provided, the electric railways would become protean, and, like Alice in Wonderland, would be unable to predict their stature from one moment to the next. It should be added, however, that in one case at least the Commission itself has recognized the necessity here of departing from the rule which permits it to indulge in inconsistency. See *Chicago North Shore & Milwaukee Railway Company*, 219 I. C. C. 135.

[28]An example is found in the present case, where the Court made separate conclusions of law on the basis of the Commission's record and, in addition, with regard to the correctness of the determination itself (R. 67, 68).

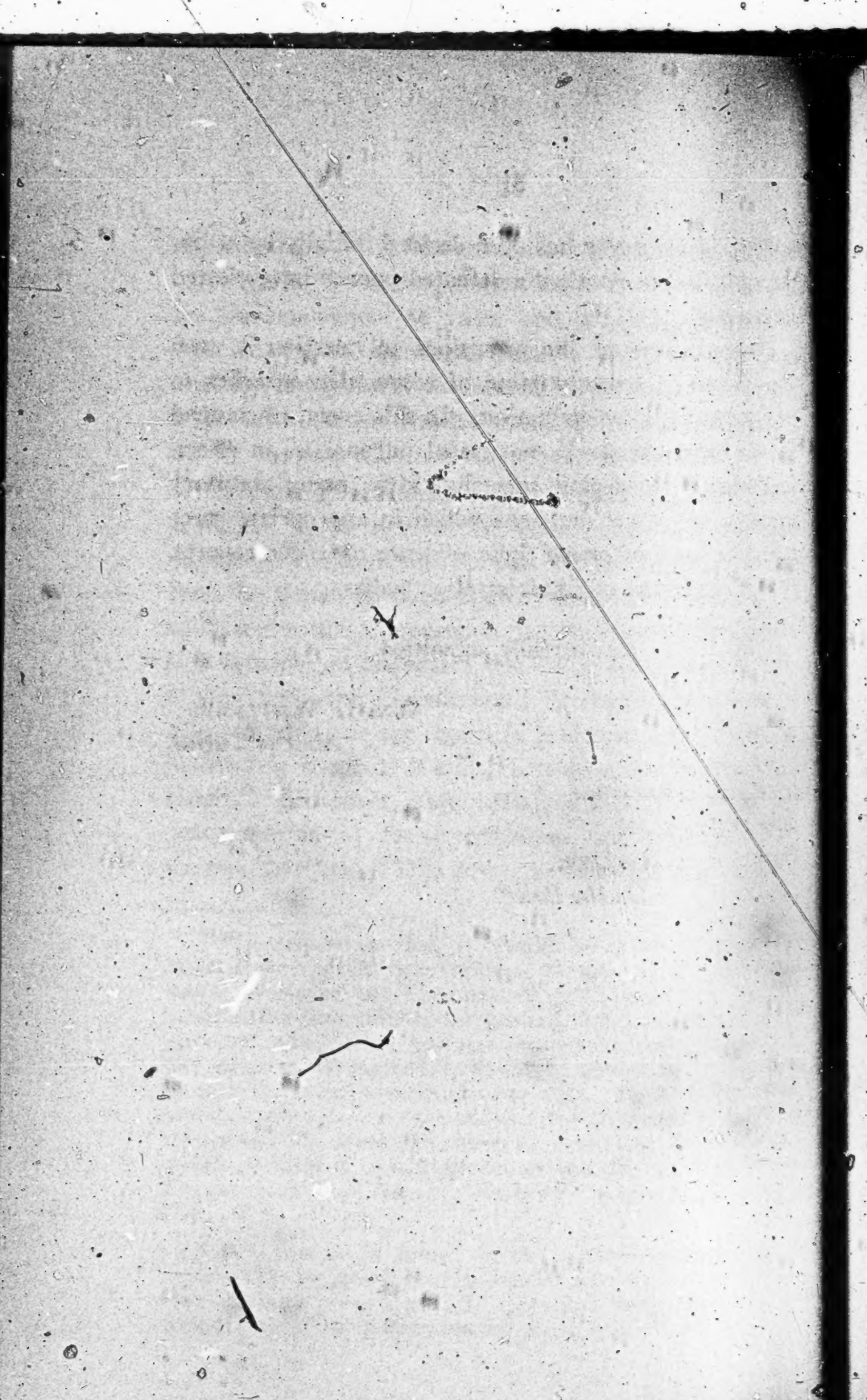
in which a controversy has been decided initially by a district court, and in which the defeated parties have elected not to appeal.

The usefulness of the provisions in question is even more obvious if a presumption of correctness attaches to the Commission's determination. In this event, to contend that the provision serves no useful purpose is, in effect, tantamount to rendering superfluous the many statutory provisions and court decisions which in appropriate cases confer the force of *prima facie* evidence upon the reports, findings and orders of administrative bodies.

Respectfully submitted,

WM. D. WHITNEY,
Amicus Curiae.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the Brief.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS and INTERSTATE COMMERCE COMMISSION,

Petitioners,

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION OF WM. D. WHITNEY FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS *AMICUS CURIAE*, AND SUPPLEMENTAL BRIEF *AMICUS CURIAE*

WM. D. WHITNEY,
Amicus Curiae.

DONALD C. SWATLAND,
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TABLE OF CONTENTS

PAGE

Motion for Leave to File a Supplemental Brief *Amicus Curiae* 1

Supplemental Brief *Amicus Curiae* 2

TABLE OF CASES CITED

United States v. *Chicago, North Shore & Milwaukee*, 288 U. S. 1 ..... 3, 4

I. C. C. v. *Piedmont & Northern Railway Company*, 286 U. S. 299 4

Mitchell Coal and Coke Company v. *Pennsylvania Company*, 230 U. S. 247, 257 4

TABLE OF STATUTES CITED

Interstate Commerce Act, 49 U. S. C. § 1(18)-(22), 15a, 20a, 26 ..... 3, 5

Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. c. 8, amending the Act of May 20, 1926, c. 347, 44 Stat. 577) 4, 5

42nd Annual Report of the Interstate Commerce Commission, dated December 1, 1928, page 83 5

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No. 28

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF *AMICUS CURIAE*

Now comes WM. D. WHITNEY, *amicus curiae*, and respectfully moves that this Honorable Court accept and consider the supplemental brief in the form annexed hereto and made a part hereof. This motion is made because, upon the argument of this case, several members of this Honorable Court expressly inquired as to a question having a vital bearing upon the procedural problems involved, viz., as to the intention of the Congress in referring the question to the Interstate Commerce Commission and as to the consequent weight to be accorded to a determination by that Commission. No other question is considered in the attached supplemental brief.

Respectfully submitted,

WM. D. WHITNEY,
Amicus Curiae.

IN THE

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Respondent.

No. 28

SUPPLEMENTAL BRIEF *AMICUS CURIAE*

This supplemental brief is addressed to the single question as to the intention of the Congress in entrusting the determination to the Interstate Commerce Commission.

In listening to the questions of the Court on the oral argument, we understood the question to be raised as to whether the Congress intended to go so far as to provide that the general rule would be that all carriers were to be subject to the statute, that exceptions in favor of particular interurbans were to be accorded only when the Commission in its wisdom and experience should determine to accord them, and that denials by the Commission should leave to the carrier, upon a proceeding in court, only an opportunity to prove that the effect of the Commission deci-

sion had been (as it were) to turn black into white or white into black.[1]

We submit that the Court, on reflection, will in any event find no support in the statute for the view, more extreme even than any taken in the Solicitor General's brief, that the statute in effect entrusted to the Commission the *legislative* function of re-defining the meaning of a statutory phrase which had been found intact in numerous prior statutes,[2] which had been construed thereunder by this Court as well as by the Commission, and the proposed amendment of which had been the subject of numerous Commission recommendations in its annual reports to Congress.

We do not say that the Congress could not constitutionally have taken a different course and entrusted a legislative function to the Commission. For example, it might have provided that all carriers should be subject to the Act excepting only those which, in the opinion of the Commission, were so divorced from the general system of steam transportation that their operations do not affect the functioning thereof. In other words, we agree that, Congress

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[1] To answer this question in the negative, is not to deprive the Commission determination of the same full force and effect that would have been accorded to it if the statute had gone on expressly to provide that its determination of fact should be conclusive if supported by evidence. This supplemental brief does not discuss the point, suggested in our main brief, that the carrier is entitled to a trial *de novo* in which the only weight to be accorded to the Commission determination is that which the courts themselves elect out of comity to accord to it.

[2] The present statutory phrase ("*Provided, however,* That the term 'carrier' shall not include any street, interurban or suburban", etc.) is at least as strong as the phrase, in § 20a of the Interstate Commerce Act, construed by this Court in the *United States* v. *Chicago, North Shore & Milwaukee,* 288 U. S. 1 ("except a street, suburban or interurban" etc.).

could have made a delegation of power to the Commission, provided, of course, that adequate standards had been set up.

But that is not what Congress did here. Here, it simply re-enacted identically the same statutory clause that had already acquired a particular legal significance, and it entrusted to the Commission only the *judicial* function of applying the Congress's own definition to particular cases and controversies as they might arise. That this was the Congressional intention, is brought into clear relief by the provision that the Commission should only act when particular cases were submitted to it by the National Mediation Board (or other administrative body) or by other particular parties interested.

Nor is this a situation in which the terms of the statute are such that they have no content until the Commission has interpreted them. It cannot be said here, as "where the suit is based on unreasonable charges or unreasonable practices," that "there is no law fixing what is unreasonable and therefore prohibited".[2] Could that be said, then this Court could not have construed identical provisos in *I. C. C.* v. *Piedmont & Northern Railway Company*, 286 U. S. 299, and *U. S.* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1.

The statutory scheme and intent of § 1 (First) of the Railway Labor Act is the more significant when considered in the light of the legislative circumstances pertaining to this and substantially identical exemption provisos in other statutes. The Interstate Commerce Commission has repeatedly recommended to Congress that such provisos in

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[2] *Mitchell Coal and Coke Company* v. *Pennsylvania Company*, 280 U. S. 247, 257.

the Interstate Commerce Act be amended (a) so as to make exemption depend upon affirmative grant thereof by the Commission in each individual instance and (b) so as to allow the Commission, in granting exemptions, broad discretion, by making the statutory test whether or not the carrier could show to the Commission's satisfaction that it was "not affected with an important national interest so far as the provisions in question are concerned."[4] Nevertheless, Congress did not amend the Interstate Commerce Act in that manner, thus indicating that it wished inclusion and exclusion to depend upon the terms of the statute and not upon the discretion of the Commission. And, as we have already noted, the language of § 1 (First) of the Railway Labor Act does not evidence any different intention in so far as concerns this Act.

To construe this statute as if it were a delegation of legislative power, when clearly it is not, would (we respectfully submit) create a precedent capable of engulfing our whole system of government under law. To hold that a statute of this character entrusts the Commission with the power of including a carrier within a statute because the Commission considers that it ought to be included, notwithstanding that the statutory clause had previously been construed by this Court as excluding carriers of that character[5], would, in effect, revive the dispensing power. We know that, however far this Court may feel constrained to go in recognizing the necessity of according to modern

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[4]42nd Annual Report of the Interstate Commerce Commission, dated December 1, 1928, page 83 (R. 252).

[5]As in our original brief, we do not re-argue the merits. As we consider procedural points only, our whole presentation is, of course, on the assumption *arguendo* that the decision on the merits is to be affirmed.

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administrative bodies the fullest opportunity for effective action consistent with the principles of due process, it will never consciously extend that opportunity so as to revive the power of executive dispensation from legislative statutes. The vital need is that, whatever be the opinion of this Court in the present case, it shall not be open to that construction.

The suggestion by the learned Solicitor General on the argument was that the use of the words "provided however" in this statute establish that the Congressional policy was to subject all carriers to this statute, unless the Commission, in its wisdom and experience, should specifically exclude them. Equally well might it be said on the other side that the word "unless" meant that all electric interurbans were to be excluded from the statute, unless the Commission, in its wisdom and experience, should specifically include them. On reflection, each suggestion fails. As in all of the prior statutes using the same phraseology, the evident intention of the Congress was that carriers of one class were to be included, and carriers of another class excluded, and there was left only the problem of determining in each particular case into which class the particular carrier falls.

It was further suggested on the argument that the statutory phrase is not easy of precise definition. But this is nothing new. If all statutory phrases were susceptible to easy definition, the functions of the Federal Courts could soon be happily atrophied. Obviously, difficulty of definition is no basis for a rule that the duty of definition is to be transferred to administrative officers.

In presenting the foregoing considerations, we have necessarily omitted all of the secondary procedural ques-

tions bearing upon the problem as to the nature of the judicial review to be had in respect of this statute, delegating as it does to the Commission a function exercisable only in particular instances and in lieu only of the function that would normally be exercised only by the executive officers administering the statute (here the National Mediation Board), and devoid as it is of any express provision for judicial review. All of these considerations were covered in our original brief.

Respectfully submitted,

WM. D. WHITNEY,
Amicus Curiae.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the Brief.

ME COURT OF THE UNITED STATES.

No. 28.—October Term, 1938.

Shields, individually and as
d States Attorney for the Dis-
of Utah, and Interstate Com-
e Commission, Petitioners,
vs.
Utah Idaho Central Railroad
Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[December 5, 1938.]

Chief Justice Hughes delivered the opinion of the Court.

case presents the questions of the effect of a determination Interstate Commerce Commission, for the purposes of the y Labor Act, that the respondent is not an interurban elec- ilway, and of the scope of judicial review of that determina-

Railway Labor Act, which applies to railroads engaged in tate commerce, excepts any "interurban" electric railway un- is operating as a part of a general steam-railroad system of portation.[1] The Interstate Commerce Commission is "author- and directed upon request of the Mediation Board or upon laint of any party interested to determine after hearing her any line operated by electric power" falls within the ex- ion. At the request of the Mediation Board, the Interstate merce Commission after hearing determined that the lines of ondent, the Utah Idaho Central Railroad Company, do not con- te an interurban electric railway. 214 I. C. C. 707. The Medi- n Board ordered respondent to post the formal notice prescribed Section 2, Eighth, of the Railway Labor Act.[2] Respondent did comply. Failure to publish the notice subjects "the carrier, cer or agent offending" to criminal penalties.[3] Respondent, in- ing that its line is an interurban electric railway and thus ex-

[1] 48 Stat. 1185; 45 U. S. C. 151.
[2] 45 U. S. C. 152, Eighth.
[3] 45 U. S. C. 152, Tenth.

cepted from the Railway Labor Act, and alleging the invalidity of the Act, brought this suit against the United States Attorney for the District of Utah to restrain him for prosecuting any proceeding based upon an alleged violation of the Act.

The District Court took jurisdiction, permitted respondent to try the question *de novo*, decided that respondent was an interurban electric railway, and granted a permanent injunction. The Circuit Court of Appeals affirmed. 95 F. (2d) 911. We granted certiorari. May 31, 1938.

As respondent, however characterized, is engaged in interstate transportation, the question whether it should be subjected to the requirements of the Railway Labor Act, relating to the adjustment of labor disputes, was one for the decision of Congress. These requirements were prescribed in the exercise by Congress of its constitutional control over interstate commerce. *Texas & New Orleans R. R. Co.* v. *Railway Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515. As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51. For that purpose Congress could create a new administrative agency or use one already existing. And as the questions of fact involved would relate to methods of railroad transportation, and thus to a field in which the Interstate Commerce Commission had peculiar expertness, Congress could fittingly commit the determination to that body.

Congress did not define the term "interurban". Despite the desirability of such a definition[4] and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. Respondent, standing upon the exception, necessarily treats it as valid and hence as susceptible of application. That view presupposes that the term "interurban" denotes distinguishing factual characteristics which on appropriate inquiry may be ascertained. We have so treated the term in other relations. *Piedmont & Northern Rwy. Co.* v. *Interstate Commerce*

[4] Annual Reports of Interstate Commerce Commission, 1921, p. 21; 1923, p. 70; 1924, p. 72; 1925, p. 72; 1928, p. 83; 1929, p. 80; to which reference is made in United States v. Chicago North Shore & Milwaukee R. R. Co., 288 U. S. 1, 11, 12.

Commission, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, 288 U. S. 1. The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power. See *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, *supra*, at pp. 13, 14.

In the instant case, the Interstate Commerce Commission has made the determination contemplated by the statute and we are not concerned with the questions which might arise in its absence. The Commission's determination was one of fact. *Shannahan* v. *United States*, 303 U. S. 596, 599. What effect shall be ascribed to it? The argument is pressed that the determination is at best persuasive and not in any wise binding upon the courts. It is urged that the Commission was restricted to determining whether respondent was operated as a part of a general steam-railroad system of transportation, which concededly it was not; that the determination of the Commission was not an "order"; that Congress has not manifested an intention that the determination should be binding in judicial proceedings and that in the nature of things it could not be made binding in criminal prosecutions.

We are unable to agree with the view expressed in the court below that the Commission was confined to determining whether respondent was operated as a part of a general steam-railroad system of transportation. Before reaching that point—as to which there was no question—the Commission had to determine whether respondent was an "interurban" line. That has been the administrative construction of the statutory provision[5] and we see no reason to doubt its correctness.

In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to "*determine*". The Commission must determine "*after hearing*". The requirement of a "hearing" has obvious reference "to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts". The "hearing" is "the hearing of evidence and argument". *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties

[5] See Texas Electric Railway, 208 I. C. C. 193; Chicago South Shore & South Bend Railroad, 214 I. C. C. 167; Utah Idaho Central Railroad Company, 214 I. C. C. 707.

affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91. The Commission is not only authorized but "directed" to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. On the contrary, in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board. The latter having obtained the determination could not ignore it; neither could the carrier.

We have held that the determination of the Commission is not an *"order"* reviewable under the Urgent Deficiencies Act of October 22, 1913.[6] *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan* case, we had no occasion there to consider. *Id.*, at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory schema. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce.[7] The Mediation Board has ordered the posting of the prescribed notice that disputes between the carrier and its employees will be handled under the Railway Labor Act. Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 621, 622; *Truax* v. *Raich*, 239 U. S. 33, 37, 38; *Terrace* v. *Thompson*, 263 U. S. 197, 214. To support its contention that equitable relief is appropriate, respondent points to the peculiar difficulties which confront it under the congressional legislation. Congress has enacted two sets of statutes

[6] 38 Stat. 208, 219, 220, 28 U. S. C. 41, 46, 47.

[7] Compare Great Northern Railway Company v. United States, 277 U. S. 172, 180; Butte, Anaconda & Pacific Rwy. Co. v. United States, 290 U. S. 127.

which involve the application of the same criterion. If respondent is subject to the Railway Labor Act, it is excluded from the application of the National Labor Relations Act;[8] otherwise not. The Railroad Retirement Act of 1937[9] has a like proviso excepting interurban electric railways and authorizing the Interstate Commerce Commission to determine whether a particular electric railway falls within the exception. A similar provision is found in the Carriers Taxing Act of 1937[10] and in the Railroad Unemployment Insurance Act of 1938.[11] In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status.

What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees,[12] and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions[13] with respect to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho*, 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (*Id.*, p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission,[14] the question on judicial review would be simply whether the Commission had acted

[8] 49 Stat. 449, Sec. 2(2).

[9] 50 Stat. 307.

[10] 50 Stat. 435.

[11] Public No. 72, 75th Cong., 3d sess. See, also, the provision of Section 9(a) of the Carriers Taxing Act of 1937, 50 Stat. 439, with respect to the application of the term "employment" as defined in Title VIII of the Social Security Act, Section 811(b).

[12] Texas & New Orleans R. R. Co. v. Railway Clerks, 281 U. S. 548; Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515.

[13] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289; Prendergast v. New York Telephone Co., 262 U. S. 43, 50; Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679, 689; Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 443, 444; Phillips v. Commissioner, 283 U. S. 589, 600; Crowell v. Benson, 285 U. S. 22, 60; State Corporation Commission v. Wichita Gas Co., 290 U. S. 561, 569.

[14] See United States v. Chicago North Shore & Milwaukee R. R. Co., 288 U. S. 1, 13, 14.

within its authority. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 444; *Florida* v. *United States*, 292 U. S. 1, 12; *St. Joseph Stock Yards Co.* v. *United States*, *supra*.

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission.

Taking that position, petitioners unsuccessfully objected in the District Court to the admission of new evidence. But that evidence was substantially the same as that produced before the Commission, which was also received. The facts carefully analyzed by the Commission (214 I. C. C. pp. 709-711) are virtually undisputed. Respondent's railway extends from Ogden, Utah, north to Preston, Idaho, a distance of 94.63 miles and has two branch lines of about 7 and 14 miles respectively. About 81.8 per cent. of the line is located on privately owned right-of-way and the remaining 18.2 per cent. on public streets or highways, these being chiefly in fifteen cities and towns. The Government concedes the point stressed by respondent that its line has many of the physical characteristics of an interurban railroad. Thus its tracks on the whole are of lighter weight, its grades slightly steeper, its curves sharper, its stations and sidetracks more frequent, its motive power of less capacity, its sidetracks shorter than is customary on trunk lines, and its passenger business is conducted in the same manner as that of any interurban electric railway. The passenger business, however, yields but a minor part (about 18.1 per cent.) of the total revenues. During the five years from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57 and the revenues from passengers, mail and express were $448,941.62. The railway is predominantly a carrier of freight. The freight traffic consists to a large extent of raw products such as sugar beets, milk, tomatoes

and peas moving to factories, canneries or processing plants, and of the manufactured products moving outbound from the plants to connecting railroads. A considerable part of the movement of the raw products requires special service with one-car or two-car trains. A daily package-merchandise train is maintained with facilities for refrigeration in summer and heating in winter and with pick-up and delivery service at all available points. In 1934 the freight trains averaged 6.2 cars each. In the last half of that year the carrier handled 6,354 carloads of freight of which 2,226 were local and 4,017 were interchanged with other carriers. The traffic originating on its line moved to points in 31 States and that delivered by it was from points in 26 States. Respondent is a party to practically all the tariffs publishing through rates to or from this territory and its interchange traffic generally moves on joint rates. It does not perform intermediate service between other lines. Practically all the interchange traffic is handled in standard equipment furnished by connecting railroads.

It cannot be said upon this evidence, and the related facts summarized in the Commission's report, that the Commission's determination lacked support or was arbitrary or capricious. Nor is there ground for holding that the Commission in reaching its determination departed from applicable principles of law. There is no principle of law which required such a carrier to be classified as an interurban railway. Failing in its effort to obtain a clarifying definition from Congress, the Commission performed its duty in weighing the evidence and reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads. Compare *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, *supra*, pp. 308-310; *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, *supra*, p. 10.

We conclude that the District Court erred in permitting a trial de novo of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint.

It is so ordered.

Mr. Justice BLACK concurs in the result.

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